DEBATES ON CONSTITUTIONAL AMENDMENTS AND THE POSSIBLE ESTABLISHMENT OF A "CONSTITUTIONAL COURT" IN JAPAN

Kichimoto Asaka*

There have been no amendments to either of the post-Tokugawa Constitutions of Japan. There is however some current interest in constitutional reform. This paper reports on developments, the areas of possible reform, and the difficulties involved in reform of the Constitution of Japan.

Depuis la fin de la seconde guerre mondiale, la constitution du Japon se caractérise par son immutabilité. Cependant, un mouvement récent en faveur d'un toilettage constitutionnel est apparu tant en doctrine que dans une partie de la classe politique japonaise.

L'auteur après avoir dressé la liste des domaines qui le cas échéant, pourraient ou devraient faire l'objet de reformes, attire l'attention du lecteur sur les difficultés que ne manqueront pas de faire naître de telles reformes.

I TWO CONSTITUTIONS AND THE LACK OF AMENDMENTS

In its modern history, Japan has had two entrenched supreme constitutional laws. First, the Imperial Constitution of Japan 1889 was promulgated by the Emperor. Its model was the Constitution of Prussia, and the Emperor was granted wide prerogative powers including the supreme command of the military forces.

Second, after the Second World War, the Constitution of Japan 1946 was promulgated. It was drafted by the occupation force staff under the command of General Douglas MacArthur. Although the amendment procedure under the Imperial Constitution was followed for the establishment of this new Constitution, it was only a formality and there was little resemblance between two Constitutions. Now, the Emperor is the "symbol of the State and of the unity of the people" (article 1), has no

* Professor of Law, University of Tokyo. This paper is based on a presentation given at the Victoria University of Wellington Law Faculty on 14 June 2005.

prerogative power, and exerts only some ceremonial powers acting on the "advice and approval" of the Cabinet (art 3). Following the devastation which resulted from militarisation, the Constitution renounced any military forces under article 9 (2).

Human rights are guaranteed by listing even more rights (such as the rights of workers and the right to a minimum standard of living) than its model, the Bill of Rights 1791 of the Constitution of the United States.

However, these two Japanese Constitutions have had one thing in common. They have never been amended. In order to amend the Constitution 1946, there are extremely high hurdles – two-thirds majority votes of each House of the bicameral Diet (Parliament) and the majority vote in a popular referendum.[2]

II AMENDMENT DISCUSSIONS FROM 1957 TO 1964

There was a serious debate for amending the Constitution 1946 from the mid-1950s to the mid-1960s. Nationalist politicians had always been contemptuous of the Constitution because, they claimed, it was shamefully "imposed on" Japan by the occupation force. When conservative parties united in 1955 in the Liberal Democratic Party[3], the new party declared a move to amend the Constitution in order to have "Our Own Constitution". The start of the Korean War in 1950 changed the occupation policy of the United States. Therefore, the rearmament of Japan started in 1950, and it resulted in the "Self-Defense Forces" of Japan and the government's strained interpretation of Article 9 (2): that the paragraph did not renounce the right to self-defense and the maintenance of minimum forces for self-defence.

In this changed environment, the Cabinet established the Commission on the Constitution in 1957. However, unexpectedly, this Commission was not a puppet or partisan of the Liberal Democrats. It gathered voluminous documents and interviewed those who were involved in the constitution-making in 1946. Without this Commission, important information could have been lost over the years. The final report of the Commission was submitted in 1964 with the enumeration of

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2 Article 96

(1) Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.

(2) Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.

3 The Liberal Democratic Party has been the ruling party for fifty years except for only one year between 1993 and 1994.

different opinions but without any specific amendment proposals.[4] Nationalist politicians were obviously disappointed, but it was the end of the matter.

After the Commission's investigation, two factors contributed to the lack of serious discussion of constitutional amendments. First, since the ruling Liberal Democrats could not control the requisite two-thirds majority in each House by itself, an amendment proposal would have needed bipartisan support. However, the Socialist Party, the main opposition party at that moment, had kept a no-negotiation stance on any amendment discussion, believing that amendments would result in the remilitarisation of Japan. Second, even among the Liberal Democrats, there was a wide spectrum of opinion. Unlike the fundamentalist wing of the party, the pragmatist wing, which had a close tie with the government officials, was interested in the economy rather than controversial constitutional amendments. In any event, the pacifist Constitution contributed to the economic success of Japan starting from 1960s, because military spending did not burden the national budget and the national economy.

III CURRENT DISCUSSION ON CONSTITUTIONAL AMENDMENT

In the 1990s, the situation changed. First, the Social Democratic Party, formerly the Socialist Party, lost the Diet seats dramatically. And the Democratic Party, which became the main opposition party after repeated realignment of parties from 1992 to 2003, does not oppose discussing some kind of constitutional amendments with the Liberal Democrats and their coalition partner, Komeito. Second, the voice of the pragmatists of the Liberal Democrats has become weaker, because the economic slump, the incompetence of government officials in relation to the economic recovery, and scandals and mismanagements in the ministries and agencies during 1990s have cost government officials and their close allies, the pragmatists among the Liberal Democrats, their credibility. Third, the United Nations and the United States demand international contributions from Japan not only financially but also militarily. Traditionally, the Self-Defense Forces were limited to active operations within the territory of Japan in addition to the non-nuclear arsenal policy. But since 1992, the Forces of Japan have been sent overseas for the United Nations peacekeeping operations, and also sent to Iraq for humanitarian aid. These international contributions are considered to be beneficial as enhancing the status of Japan in the international arena and, especially, for securing a permanent seat on the United Nations Security Council, an ambition of Japan at this moment. Still, laws prohibit the Self-Defense Forces from being involved in overseas combat operations. However, now the discrepancy between the text of Article 9 (2) of the Constitution and the reality and necessity of the Self-Defense Forces is clear.

In 2000, each of the House of Representatives (Lower House) and the House of Councillors (Upper House, which is elected too) set up a Research Commission on the Constitution. In April

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4 John M Maki *Japan's Commission on the Constitution: The Final Report* (University of Washington Press, 1980).

2005, the two Commissions submitted final reports. The report by the Lower House Commission took a positive stance on constitutional amendments and indicated eight matters for possible amendments – (1) preamble, (2) Article 9, (3) new rights such as a right to environmental preservation and a right to privacy, (4) review of the bicameral Diet system, (5) establishment of a Constitutional Court, (6) clarification of provision for subsidy to private educational institutions, (7) local self-government, and (8) national emergency. On the other hand, the report by the Upper House Commission had a negative attitude to amendments with an exception of the positive opinion for guaranteeing some new rights.

One explanation of this difference of attitudes of two Houses is that the opposition parties have a slightly larger share of seats in the Upper House compared with the Lower House, although the ruling coalition controls the majority in both Houses. However, a more cynical explanation is that the Upper House worries about a constitutional amendment for abolishing the Upper House or stripping it of substantial powers. In a unitary country like Japan, it is difficult to differentiate an elected Upper House from the Lower House by distributing functions between two Houses or by designing different electoral systems, although the guarantee of six-year term for Councillors is differentiated, from the four-year term with a possibility of earlier dissolution of Representatives. Still, the Upper House seems prepared to fight for its existence, and at this moment, it has a power to block any constitutional amendment proposals. Indeed, one-third of Councillors have that power. At least, the Lower House cannot pass a constitutional amendment unilaterally without a compromise with the Upper House.

Now that the reports from the Research Commissions have been submitted, the next steps have to be taken. First, a new select committee of each House will be authorised to draft amendment proposals in detail, because the Research Commissions were authorised only to examine the possible amendments but not to propose amendments. At the same time, the Diet will enact a Popular Referendum Law, which provides for the voter qualifications and procedure of a referendum for a constitutional amendment and, probably, for the means for challenging the vote counts, and the whole referendum process, in courts. Such a law is necessary because Article 96 of the Constitution provides only for the requirement of a referendum but refers its specific procedure to an ordinary law. To date, such a law has not been enacted because there has been no viable amendment proposal. These first steps can be taken within 2005.

Second, political parties are expected to submit their own amendment proposals. The Liberal Democratic Party plans to celebrate its semi-centennial general meeting in November 2005 with a constitutional amendment proposal, making good its original commitment. The Democratic Party and Komeito are expected to make public their own proposals in 2006. Third, based on these proposals, the Diet debate on specific amendment proposals will start in 2007.

However, this timetable might be difficult to follow. Already, the political momentum for constitutional amendments has stalled, because politicians are debating a controversial postal office reform proposal, which is a pet project of Prime Minister Junichiro Koizumi but which faces strong

opposition even from his own party ranks. This short-term political priority has caused the delay for taking the next steps for the constitutional amendments. It might be doubted whether the politicians' enthusiasm for the long-term project of constitutional amendments will last long.

At the same time, popular support for constitutional amendments might not be solid. Certainly, opinion polls have shown that the majority of general public has a positive view for some kinds of constitutional amendments. However, those responses were abstract ones, and so it is not known how the public will react to more specific amendment proposals. And at this moment, the general public seems to be more interested in another issue, which has a constitutional implication but necessitates no constitutional amendment. That is the future succession of the Emperor. The Imperial House Law 1947 s 1 provides that the Emperor must be a "male with a paternity bloodline from an Emperor". However, the imperial family has had no baby boy for forty years. It means that there will be no legitimate successor of the Emperor after the Crown Prince and his younger brother, considering the age of their wives (concubines are now unacceptable). The government is now considering an amendment to the Imperial House Law, and Japan might have a princess on the imperial throne in future. But this is not related to the constitutional amendment discussion, and there is no serious proposal for changing the status of the Emperor as "symbol", much less for abolishing the Emperor (though the Communist Party has traditionally insisted on it), by a constitutional amendment.

IV INDEPENDENT CONSTITUTIONAL COURT?

Under Article 81 of the Constitution 1946, the Supreme Court of Japan is granted the judicial review power over the constitutionality of statutes. Because of this important role, the Supreme Court has three characteristic features, although the judicial system follows the civil law model basically including the career judge system.

First, the Chief Justice is nominated by the Cabinet and formally appointed by the Emperor (Art 6 (2)), and fourteen Associate Justices are appointed by the Cabinet (Art 79 (1)). They are appointed not only from career judges, practising lawyers, public prosecutors, and law professors, but also from those who have a variety of backgrounds and "perspective and legal knowledge", including diplomats and government officials who may not have been trained in law (Courts Law 1947 s 41).

Second, the Justices must pass a popular retention vote at the first general election after their appointments. When a majority of votes are for their dismissal, they will be dismissed (Art 79 (2) – (4)).

Third, concurring and dissenting opinions, if any, are disclosed in addition to an anonymous opinion of the Court (Courts Law s 11). In lower courts, whether a judgment of a panel is unanimous or there is a dissenting judge is confidential.

These arrangements were expected to serve for the active role of the Supreme Court on constitutional interpretations. However, it does not seem the Supreme Court functions as expected.

The Supreme Court experienced political heat from the Liberal Democratic Party in the early 1970s, when some Supreme Court decisions favouring workers' rights touched a nerve of the Party, and the Association of Young Lawyers, which had included some lower court judges as members, was considered as leftist.[5] Since then, the Supreme Court has been careful not to cause a political uproar and kept a watchful eye of the quality control on lower court judgments. As a result, recently we have not seen a political intervention in the appointments or judgments of the Supreme Court. However, it seems this has gone too far, and the Court has built a bureaucratic structure within the judiciary.

Now, the Supreme Court Justices are appointed according to an informal but rigid quota – six from career judges (one of them is appointed as the Chief Justice), five from practising lawyers, and the remaining five from public prosecutors, law professors, Directors-General of the Cabinet Legislation Bureau, diplomats and government officials. Moreover, when a vacancy is expected because of the seventy-year retirement age, the Chief Justice recommends one candidate to the Prime Minister, and the Cabinet appoints that person without knowing much about the appointee. When the vacancy is on the career judge quota, the Chief Justice recommends one of the senior lower court judges. And when the vacancy is on the practising lawyer quota, he accepts a suggestion from the national bar, which suggests one of the leaders of the national bar and local bars. The Chief Justice recommends his own successor, when he is reaching the retirement age. When a vacancy is on the "remaining five" category, the Prime Minister might be able to pick someone more freely, but even in this case, he does not try to influence Supreme Court judgments but simply appoints one of the uncontroversial candidates who has a similar career to that of the retiring Justice.

At the same time, the Supreme Court Justices are supported by law clerks, who are not new law graduates but middle-aged career judges. They help Justices, who might have little or no previous courtroom experiences, with research and opinion drafting. But they are sometimes criticised as too influential on Justices' decision-making. Although it cannot be confirmed statistically, the technocratic meddling of those law clerks might be the cause of the recent decrease of concurring and dissenting opinions or the decrease of superb ones among them.

The Supreme Court sits as the Grand Bench of all fifteen Justices in important cases such as constitutional law cases, but usually the Grand Bench does not take more than one case at a time, and, therefore, most cases are heard and decided by one of three Petty Benches with five Justices each. Each Justice is assigned to one of the three Petty Benches and is not reassigned to another until his or her retirement. And so there is a potential of conflict of opinions between Petty Benches, but in reality, such differences are minimal.

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5 One of the judges of the Association held the Self-Defense Forces unconstitutional. Sapporo District Court Judgment of 7 September 1973, Hanrei Jiho 712-24.

Because of this apolitical appointment system, the Supreme Court and lower courts enjoy independence of judiciary, although the tight supervision by the Supreme Court might compromise the independence of individual judges. However, in return, the Supreme Court plays only a passive role in constitutional decision-making. Although the Supreme Court sometimes holds a statute unconstitutional "as-applied" to the particular fact settings, it has held only six statutes unconstitutional "facially".[6] Among them, four statutes were technical ones, and so there was no worry about causing a political backlash. When the Supreme Court held the mandatory sentence of death or life imprisonment for patricide unconstitutionally harsh compared with ordinary murder in 1973, it received a moralistic reaction, but the criticism against the judgment died down soon. When the Supreme Court held the electoral boundaries unconstitutional in 1976 because there was an imbalance of population among electoral districts, of course, a political repercussion was expected. But the Court left the task for mending the unconstitutionality to the Diet itself and the Diet had little difficulty in doing a minimum remapping. As a matter of fact, the Supreme Court does not avoid constitutionality issues. Certainly it tends to hold statutes constitutional, often allowing the Diet a wide legislative discretion.

So long as the Supreme Court keeps a technocratic attitude,[7] the general public has little interest in, and little knowledge about, the Justices. Therefore, when the retention votes are held, few voters know who the Justices are, although skeleton information is distributed in advance. Even law students can identify one or two names of the fifteen Justices at most. No Justice has ever been dismissed by the retention vote, and usually negative votes do not reach ten per cent of the total votes.

Against this background, there is a constitutional amendment proposal for establishing an independent "Constitutional Court" such as Bundesverfassungsgericht of Germany, and the Conseil constitutionnel of France, or a constitutional law bench in the Supreme Court, which is expected to scrutinise constitutional matters more closely. This proposal is not detailed yet, and so we do not know who is supposed to appoint those judges and whether it is really designed to meet the expectation.

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6 Supreme Court (Grand Bench) Judgment of 28 November 1962, Keishu 16-11-1593 (confiscation of ships and cargoes involved in a customs law violation without notice and hearing even when the owner is different from the violator, "against due process"); Supreme Court (Grand Bench) Judgment of 4 April 1973, Keishu 27-3-265 (mandatory sentence of death or life imprisonment for murder of a lineal ascendant, "inequality"); Supreme Court (Grand Bench) Judgment of 30 April 1975, Minshu 29-4-572 (keeping the distance of a new pharmacy from existing ones, "infringement on the freedom to choose an occupation"); Supreme Court (Grand Bench) Judgment of 14 April 1976, Minshu 30-3-223 (disproportional distribution of electoral seats among electoral districts, "inequality"); Supreme Court (Grand Bench) Judgment of 22 April 1987, Minshu 41-3-408 (limitation of division of common ownership of forestry, "infringement on property right"); Supreme Court (Grand Bench) Judgment of 11 September 2002, Minshu 56-7-1439 (liability limitation on the mishandling of registered mail, "violation of the state liability provision").

7 However, this attitude might be changing slightly during the current tenure of Chief Justice Akira Machida (2002).

However, it might be strange for politicians to assist their own products to be held unconstitutional. The cause of this apparent self-contradiction might be the politicians' antagonism against the Cabinet Legislation Bureau. The Bureau assists the Cabinet by drafting government Bills and by advising on statutory and constitutional interpretations. The Bureau is staffed mostly with non-lawyers, although some judges and public prosecutors are assigned to the Bureau services. Their statute drafting style has a reputation for being extremely meticulous and formalistic. At the same time, their statutory and constitutional interpretations are legalistic and conservative. Curiously, their advice virtually binds the government actions, and even the Prime Minister cannot ignore that advice. In other words, if the Supreme Court hesitates to exert its judicial review power on the constitutionality of statutes after the fact, the Bureau has made sure that those statutes are not unconstitutional before their enactment. On the other hand, politicians' preferred policies could be frustrated by the Bureau's legal advice and it might make those politicians furious. If this guess is correct, the independent Constitutional Court is proposed just as an alternative to the officious Bureau.

V CONCLUSION

The Supreme Court will probably not review the constitutional amendment process and vote count in the Diet, because it is considered to have no constitutional authority to intervene in the internal autonomy of the coequal political branch by the separation of powers principle or "political question" doctrine. On the other hand, it will be able to examine the propriety of the popular referendum according to the provisions of the "Popular Referendum Law". But once an amendment is ratified according to the prescribed procedure, the Court will have to accept its substantive content as it is, because the Court has no judicial review power of the constitutionality of a constitutional provision, so long as it does not rely on an anomalous concept of "unconstitutional Constitution" or "super-constitutional norm".

However, although the discussion for constitutional amendments is moving forward with unprecedented momentum, we have not seen detailed proposals. And the two Houses of the Diet seem to need to have some kind of compromise, if they propose some amendments for the public to ratify. It might be a long time before we see some new provisions in the Constitution of Japan, or it might be soon. We might see a dramatic change in the constitutional regime, or only a minor revision of words. However, I can assure you that there are very many hurdles to be cleared before finalising this constitutional amendment project.