

# Amendment of the Japanese Constitution— A Comparative Law Approach

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## Preface

It has been argued that it is more difficult to amend the Japanese Constitution than the U.S. Constitution. To effect a recent change in the Japanese Constitution, on July 1, 2014, Prime Minister Abe Shinzo announced a modification of the interpretation of Article 9 of the Constitution by way of a cabinet decision. Other imminent plans to revise the Constitution are Abe's planned amendments to revise sections related to defense powers in 2015.

Using a comparative law approach, this article examines these two efforts to revise the Japanese Constitution in a broad review of whether now is the time to amend the Constitution.

It is said that the interpretation of the Japanese Constitution is too complicated for the general public to understand. A Japanese Constitutional scholar's duty is to solve this difficult question and bridge the gap between ordinary life and texts of legal statutes, and the Japanese Constitution.

## I: Article 9

### 1. The Sunagawa Case

The current Japanese government was established after WWII, its new Constitution having been promulgated in November 1946, and taking effect in March 1947. Sixty-eight years have passed; seventy, since the Japanese government accepted the Potsdam Declaration in 1945.<sup>1</sup> This section reviews the

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1. Hideo Tanaka, "A History of the Constitution of Japan of 1946." In *The Japanese Legal System*, edited by Hideo Tanaka and Malcolm Smith (Tokyo: Tokyo University Press, 1976),

issues regarding the article 9 of the Japanese Constitution.

Article 9 in Chapter 2 states:

“[a]spir[ing] 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.”

In this context, the Japanese Supreme Court has often dealt with the question of the Constitutionality of the use and existence of military forces for self-defense. The Court has not provided a clear answer to the question, which has led to controversies among the general public and Constitutional researchers.

The Sunagawa case<sup>2</sup> addressed the security<sup>3</sup> treaty concluded between Japan and the U.S. in September 1951, providing the foundation for the Abe administration’s endorsement of a collective self-defense force<sup>4</sup> on 1 July, 2014. In this case, the Japanese Supreme Court reviewed the treaty and held that the foreign forces stationed in Japan did not constitute an “army,” as prohibited in Article 9. Only the forces managed by Japanese government constituted an “army” prohibited under that Constitutional article.

In the Sunagawa case, the government began a survey of the property of Tachikawa airport in July 1957 for the purposes of constructing the U.S. armed forces base at that site. A critical public objected to the base construction, and protested near the fence on the property of the airport. After a while, the shouting, demonstrating groups wrecked the fence, and trespassed on the property within an area of several tens of meters. They were arrested and prosecuted under the Law for Special Measures Concerning Criminal Cases to Implement the Administrative Agreement under Article III of the security treaty.

The defendants claimed that the prosecution contravened Article 31<sup>5</sup> of the

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653.

“1–6 Records of Negotiations Related to the Acceptance of the Potsdam Declaration,” The Birth of the Constitution of Japan, <http://www.ndl.go.jp/constitution/e/shiryo/01/010shoshi.html> (accessed March 29, 2015).

2. Saiko Saibansho [Sup.Ct] Dec. 16, 1959, Showa 34(A) no. 710, 13 Saiko Saibansho Keiji Hanreishu [Keishu], 3225.

3. Kyu Nihonkoku to Amerika Gasshukoku to no aidano anzen hoshou jouyaku [The Old Security Treaty between Japan and the U.S.] Japan-U.S., April 28, 1952, Treaty No. 6, 1952.

4. “The right to use force to stop armed attack on a foreign country with which it has close relations, even when the state itself is not under direct attack.” In *The Japanese Legal System*, edited by Curtis Milhaupt And Mark Ramseyer (New York: Foundation Press, 2012), 229.

5. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 31 (Japan). No person shall be deprived

Japanese Constitution, and that the U.S. army forces stationed in Japan were unconstitutional under Article 9.

In March 1959, the Tokyo district court judge Date Akio held that the stationing of the U.S. armed forces could not be permitted, because it contravened paragraph 2, Article 9 of the Japanese Constitution.<sup>6</sup>

The prosecutor appealed to the Supreme Court, bypassing the appeal court. Nearly eight months after the Tokyo district court decision, the Japanese Supreme Court held in December 1959 that Article 9 renounces “the so-called war and prohibits the maintenance of the so-called war potential, but certainly there is nothing in it which would deny the right of self-defense inherent in our nation as a sovereign power. The pacifism advocated in our Constitution was never intended to mean defenselessness or nonresistance.”

According to the Sunagawa decision, paragraph 2 of Article 9 did not “include foreign armed forces even if they are to be stationed in our country.”

The Japanese Supreme Court determined that the court could review the treaty between Japan and the other state, but avoided determining the Constitutionality of the treaty. During this period, young Japanese citizens were concerned that the treaty would lead the Japanese government into unnecessary international disputes, which was clearly denounced in the preamble of the Japanese Constitution.

The Japanese Supreme Court said that in the formulation of the treaty, “the Cabinet of the Japanese Government then in power, negotiated with the United States on a number of occasions in accordance with the Constitutional provisions, and finally concluded the same as one of the most important national policies. It is also a well-accepted public knowledge that...the question of whether the treaty was in accord with the Constitution was carefully discussed by both Houses and finally ratified by the Diet as being a legal and proper treaty.”

This is called Japanese “political question” which avoids judicial review the dispute with case and controversies.<sup>7</sup>

The Japanese Supreme Court held that Tokyo district court committed an error “when it ruled that Article 2 of the Special Criminal Law was unconstitutional and void, based on the assumption that the stationing of the US troops was illegal.”

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of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

6. Tokyo Chiho Saibansho [Tokyo Dist. Ct.] March 30, 1959, Showa 34 (Tokuwa) no. 6, 1952, 367, 368, 89 Hanrei Taimuz [Hanta] 79 (Japan).

7. Political question is “decisions concerning a fundamental governmental action with a highly political character should not be made by the judiciary. Instead, the political branches of government, which are accountable to the people directly, or finally the people themselves should make these decision, even if” the dispute has case and controversies. Taisuke Kamata. “Adjudication and the Governing Process.” In *Japanese Constitutional Law* (Tokyo: Tokyo University Press, 1993), 156–7.

Accordingly, the Court vacated original decision and reversed.

The Abe administration views the Sunagawa case as endorsing the right of collective self-defense as sovereignty. Asahi newspaper and Mainichi newspaper criticized the government in their editorials.<sup>8</sup> Sankei and Nikkei newspapers are for amendment of Japanese Constitution.<sup>9</sup>

## 2. Former (1981) Interpretation of the Defense Right

The Cabinet Legislation Bureau<sup>10</sup> (CLB) (Naikaku Houseikyoku) has played a leading role in announcing public statement of Constitutional interpretation. It established in 1952 as a branch of administration, has made a formal governmental announcement for the interpretation of the Japanese Constitution. Before Abe's cabinet decision in the summer of 2014, according to CLB's explanation, the self-defense power was divided into two powers, individual and collective defense powers per Article 51 of the United Nations Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.<sup>11</sup>

Under this provision, the CBL maintained the position that the Japanese Constitution allowed only individual self-defense power, not collective.

Three conditions must be met to exercise self-defense power. First, an immediate and imminent threat must occur; second, no alternative measure must exist; and third, the required minimum ability to use its self-defense power.

On December 5, 1980, asked from member of house of the representative, the Japanese government answered that Article 9 did not deny the self-defense power as a part of one independent sovereignty, and the government is allowed to

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8. "Sunagawa Hanketsu no Gotugo Kaishaku" [Convenient interpretation of Sunagawa decision], *The Asahi Shinbun*, (April 6, 2014).

"Shudanteki Jieiken, Konkyo naki Kenpo no Hakai" [Collective defense power, groundless destruction of Constitution], *Mainichi Shinbun*, (May 16, 2014).

9. "Shshou ha doudou to igi wo katara" [Prime Minister should argue for the cause], *Sankei Shinbun*, (July 15, 2014).

"Shudan anzen hoshou no giron wo soukyu ni susumeyo" [Discussion regarding collective security is needed], *Nikkei Shinbun*, (July 16, 2014).

10. Naikaku Housei Kyoku [Cabinet Legislation Bureau], <http://www.clb.go.jp/english/index.html>

11. Article 51 of the Charter of the United Nation.

exercise necessary minimum ability to defend itself.<sup>12</sup>

On May 19, 1981, questioned from the member of the house of the representative, the government pronounced that the Japanese Constitution clearly denied the exercise of collective defense power, which was defined as the real ability to prevent attack by a foreign county upon a country with a close relationship with Japan, in case of no attack upon Japan. The Japanese government announced that Japan had collective defense power, but could not exercise it.<sup>13</sup> It did not, however, clearly define the substantive contents of collective defense power under Article 51 of the U.N. Charter.<sup>14</sup>

The grounds for the government's assertion were that exercising collective defense power was beyond the necessary minimum ability to defend, according to the CBL. Collective defense power involves an attack upon a foreign nation that is allied with Japan. It did not meet the second condition of illegal attack by a foreign nation upon Japan.

These announcements by the government shows inconsistency for interpretation of Article 9.<sup>15</sup> The government made up explanations as a temporary measure. Clearly, the Japanese government has publicly announced makeshift and inconsistent interpretations. Behind this technical interpretation of Article 9, the Japanese government needed to justify a self-defense force during the Cold War between the Soviet Union and the U.S.

For example, on February 29, 1956, director Funada Naka of defense agency for Prime Minister Hatoyama Ichiro announced that the self-defense power included attacks against an enemy's basement in the 1960 renewal of the Security Treaty between Japan and the U.S.<sup>16</sup> He asserted that collective defense power was intended to use military force.

In 2004, the Director of the CBL announced that collective defense power related to the force of the ability to defend.

After Abe took back the reins of government in December 2012, he further changed the interpretation of Article 9. In 2013, a private committee established by him considered several situations involving collective defense power. This committee concluded that to attack a missile that flies to the U.S. over Japanese territory would be included in collective defense power; to support the U.S. marine ship was included in collective defense power; and to rescue foreign forces that worked together for Peace Keeping Operations required relaxation of the

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12. Asano, Etl, *Kenpo Tobenshu*, (Shinzansha, 2003), 43.

13. *Id.* At 98.

14. Masahiro Sakata, *Seihu No Kenpokaishaku*, [Governmental Interpretation of Constitution] (Yuhikaku, 2013), 62.

15. *Id.* At. 54-67.

16. Nihonkoku to Amerika to no aida no sougo kyouryoku oyobi annzen hoshou jouyaku, [Treaty of Mutual Cooperation and Security between the United States and Japan] June 23, 1960, Treaty No. 6, 1960.

conditions on self-defense forces' use of weapons.

In May 2014, this private committee submitted several proposals to the Abe administration, advising that amendment of existing statutes for defense was needed, to clarify the scope of collective power, and the approval of the Diet to send self-defense forces abroad.

The Japanese government established the National Security Council (NSC) in December 2013. The National Security Strategy (NSS) and National Defense Program Guidelines (NDPG) were also adopted that month.

The legal basis for security was reconstructed in 2014. The Abe administration justified a change in policies by noting the changes over time since the establishment of the Japanese Constitution in 1947. When the Constitution was drafted, the ideal of creating the United Nations forces prevailed in society, and Japan was not expected to play an active role in regional global security. In the 21st century, however, Japanese government faced a rapidly changing global power balance, technological progress, and emerging threats.

In 2014, the Abe administration announced new three conditions to make defense power permissible under Article 9. First, either an attack upon Japan must occur, or a nation in close relationship with Japan is attacked, the existence of the Japanese nation is endangered, and it's clear that life, liberty, and the right to the pursuit of happiness is threatened. Second, there must be no alternative measure to prevent attack and preserve the nation and protect its people. Third, its exercise must meet the necessary minimum requirement.

### 3. Constitutional Law Scholar's Opinion

Abe's Cabinet decision in 2014 surprised Japanese constitutional law scholars. Professor Hasebe Yasuo holds that the Japanese Constitution allows only individual defense-power, not collective defense power, to protect human life in the event of imminent danger. The Japanese Constitution does not permit forcing people to have a certain point of view on how to live. In comparison, the former government interpretation to allow only individual defense power is persuasive, objective, and based on medium-and long-term perspectives.<sup>17</sup>

According to Hasebe, it is true that Japanese people have various perspectives on keeping peace,<sup>18</sup> and the Japanese government has denied collective defense power and trust in peace and safety by international society.

The new 2014 announcement allowing collective defense power lacks

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17. Hasebe Yasuo, "Shudanteki Jieiken Kousi Younin ron no mondaiten" [The problems of endorsement of collective defense power], *Jiyu to Seigi* [Liberty and Justice], 8 (2014): 65–69.

18. Hasebe Yasuo, *Kenpo*, [Constitution] (Shinseisha, 2011), 59–74. Hasebe Yasuo, *Kenpo to Heiwa wo Toinaosu*, [Question Again The Constitution and Peace] (Chikumashinsho, 2004), 29–42.

deliberated justification.

## II: Cabinet Decision under the Constitution

Under the Japanese Constitution, the Prime Minister has power to appoint and remove ministers from office by Article 68.<sup>19</sup> Cabinet decisions need all the ministers' approvals. Article 65<sup>20</sup> provides for executive power. Under Japanese administrative powers, the inferior organizations, Cabinet Secretariat (CS), the CBL, and the National Personnel Authority support the Cabinet. The CS provides direct support with the general and ordinary business of the Cabinet. The CBL's work is to review the bills to be drafted by the ministries. The National Personnel Authority controls the performance rating and recruitment of human resources. The Director of the Cabinet Office is the Prime Minister, overseeing the other ministries.

The Director of the CBL is not a minister. Abe appointed Komatsu Ichiro as Director of the CBL to change its public Constitutional interpretation of Article 9 in August 2013. The executives of this Bureau are recruited only from the Ministry of Justice, the Ministry of Finance, the Ministry of Internal Affairs and Communications, the Ministry of Economy, Trade and Industry, and the Ministry of Agriculture, Forestry and Fisheries. Komatsu Ichiro was the first director who was appointed from the Ministry of Foreign Affairs by Prime Minister Abe.

Japanese newspapers refer to CBL as the keeper of the Constitution,<sup>21</sup> although this is not entirely accurate. The job of the Bureau is to review bills before submission and deliberation at the Diet;<sup>22</sup> for this reason, a more correct description would be keeper of the government.<sup>23</sup> The official announcement of interpretation from the CBL binds governmental discretion of interpretation, but Japanese constitutional law researchers should clarify that the final and supreme interpreter is not the CBL, but the Japanese Supreme Court. The media's description illustrates the need for Japanese constitutional law scholars to bridge the information gap between the Constitution and the general public.

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19. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 68 (Japan). The Prime Minister shall appoint the Ministers of State.

20. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 65 (Japan). Executive power shall be vested in the Cabinet.

21. "Houseikyoku Chokan" [Director of CBL, the keeper of the Constitution], *The Asahi Shimbun*, (March 14, 2014).

22. Sakata Masahiro, *Hou No Bannin, Naikaku Houseikyokuno Kyouji*, [Keeper of Constitution] (Ohtsukishoten, 2014), 50.

23. *Supra* note 14, at 2.

## 1. Change in Government Interpretation of Article 9 in 2014

In May 2014, the private committee for the reconstruction of legal basis for national security was summoned. The committee, a private organization subsidized by CS, submitted its report to Prime Minister Abe. This report started discussion by the ruling Liberal Democratic Party (LDP) and the Komeito party. The coalition government had a plan to submit a bill to the extraordinary session of the Diet in 2014. Two ministers' resignations<sup>24</sup> prevented this schedule. In March, the LDP and the Komeito party reached agreement to legislate to send self-defense forces overseas with no time limit.

Some Constitutional law researchers<sup>25</sup> criticized the cabinet decision of 2014. Suga Yoshihide, the Chief Cabinet Secretary, explained that the bill would be deliberated in the session of the Diet. In parliamentary system, the Diet and the Cabinet are required to work together to deliberate and pass the bill. No bill existed in time of the cabinet decision in 2014, however. Only facts were piled up. In 2015, the relevant bills are planned to be submitted in the session of the Diet.

## 2. The Problem of the Cabinet Decision

In reaching its decision in 2014, the Cabinet exercised its power to maintain Constitutionality of the bill by using the CBL. Professor Arikawa Tsunemasa<sup>26</sup> points out that the bill did not exist in 2014, when the Cabinet undertook to explain its decision to the Diet, the highest organ of state power, under Article 41.<sup>27</sup> He noted that the public announcement by the Cabinet ignored the deliberations on the issue that occurred in committee or in the Diet.

Hasebe<sup>28</sup> also criticized the CBL, arguing that it should maintain a mid-and long-term perspective of governmental policy, independent of the Cabinet from time to time. Though its Director is appointed by the Prime Minister, this does not mean that that the Director needs to follow the political command of the Prime Minister. Moreover, even if such appointment follows the Prime Minister, the justices of the Japanese Supreme Court are not necessarily under the chain of command of the Prime Minister and the Cabinet.

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24. Matsushima Midori resigned ministry of Justice. Obuchi Yuko resigned the Ministry of Economy, Trade and Industry in October 2014.

25. *Supra* note 17.

26. Arikawa Tsunemasa, "Kenpo Kaishaku Kenryoku" [The Power of Interpretation of Constitution], *HourituJihou*, 6 (2014): 86–88.

27. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 41 (Japan). The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.

28. *Supra* note 17.



In 2013, former CBL Director Yamamoto Tsuneyuki<sup>29</sup> criticized his successor Komatsu Ichiro's change of government interpretation of Article 9 when he was appointed Justice of the Supreme Court by Article 79.<sup>30</sup> The CBL monitors bills prepared by the ministries of the Cabinet, and if a bill fails review, it only means that it cannot be submitted to the Diet. Yamamoto said that Article 9 does not permit a collective defense force, and that a Constitutional amendment would be required, to be judged by the Japanese people.

Hasebe and Arikawa<sup>31</sup> both foresaw in 2014 that the Cabinet decision without any bill would accelerate the revision of relevant statutes around Article 9 in 2015, and its importance, drastic change of national policy would lack the legitimacy of democracy.

The Abe administration had used the new term "proactive contributor to peace." These professors were of the opinion that this notion of peace was too speculative and subjective, compared to the pre-2014 government announcement of the interpretation of the Japanese Constitution.

### III: Article 96

#### 1. Article 96 and the National Referendum Act for Amendment of the Japanese Constitution

The Japanese Constitution has been referred to as a rigid Constitution. Similar to the U.S. Constitution, which is the oldest written Constitution, Japan's is also written.

Article 96 of Chapter 9 of the Japanese Constitution states:

"[a]mendments 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. Amendments when so ratified shall immediately be promulgated by the emperor in the name of the people, as an integral part of this constitution."

The Japanese Diet consists of two branches: the House of Representative and the House of Councilors. Article 96 requires a two-thirds concurring vote in each House for passing a referendum. According to the National Referendum Act for

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29. Nikkei Shinbun [Nikkei newspaper] August 20, 2013.

30. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 79 (Japan). Article 79. The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.

31. *Supra* note 26.

Amendment of the Japanese Constitution,<sup>32</sup> an amendment bill may be submitted by each House. The submission of a proposal requires the approval of one hundred members in the House of Representatives. A proposal by the House of Councilors needs the approval of fifty members.<sup>33</sup>

Such proposal is then referred to a constitutional examination board, requiring majority approval. After the examination board passes the bill, it is returned to the House of Representatives and the House of Councilors. Each House then requires a two-thirds concurring vote. After this, the bill is sent to the Japanese people as a referendum.

For 60 to 180 days, the amendment bill is publicized by newspapers and television.<sup>34</sup> The eligible age for referendum voting will be eighteen years old in 2018. Voters mark approval or denial and submit their ballot in secrecy. The emperor then publicly announces amendment of the Japanese Constitution, if the Japanese people have approved by a majority.

Professors Ashibe Nobuyoshi<sup>35</sup> argues that the ruler and the ruled should be consistent with each other. The Japanese people deliberate and consider in the interest of minors and future generations. In the name of sovereignty of the people, it is the people who need to carve out their destiny, take responsibility, and accept their decision. Even though it might be wrong in the long run, this guarantees the legitimacy of the democracy.

In 2015, the total number of seats in the House of Representatives is 475; 242, in the House of Councilors. The outcome of the lower house election on December 14, 2014 revealed that the LDP and its junior ruling coalition partner Komeito Party maintained their seats, winning 326 seats out of a total of 475 in the House of Representatives.

## 2. Amendment Proposal of the U.S. Constitution and the Role of Elections

Article 5 of the U.S. Constitution provides for Constitutional amendments. It requires a two-thirds vote in favor, in both the House of Representatives and the Senate. At the request of two-thirds of the states, a convention to propose amendments is called.

In the past, state legislatures proposed a bill to amend the Constitution to restrict federal income tax, for example, but the proposal not accepted by the U.S. Congress. The power of state legislatures is only to call the proposal for

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32. Nihonkoku Kenpou no Kaisei tetuduki ni kansuru houritu [the National Referendum Act for Amendment of the Japanese Constitution] Art. 1.

33. Kokkai hou [The Diet Act] Art. 68-2.

34. Nihonkoku Kenpou no Kaisei tetuduki ni kansuru houritu [the National Referendum Act for Amendment of the Japanese Constitution] Art. 2.

35. Ashibe Nobuyoshi, *Kenpo*, [Constitution] (Tokyo: Iwanami Shoten, 2011), 346.

amendment to the Congress, not to pass the amendment itself, as the federal legislature is not subject to state legislatures.

States must then ratify the proposal submitted by the Congress, through one of two means: ratification by state legislature or by convention. The Congress can also add a supplementary resolution that states are required to ratify within a reasonable period.

Compared with the Japanese Constitution, there are both differences and common aspects. One might not say that the U.S. Constitution is more easily amended, in consideration of the following.

For one thing, amendment of the Japanese Constitution does not involve the forty-seven prefectures. The Japanese Constitution does not have federalism system; Chapter 8 provided for autonomy of the local governments. Article 95<sup>36</sup> allows the prefectures to pass statutes to govern within their own borders.

Second, members of the U.S. state legislatures are elected before ratification. The Representatives do not go through the election process specifically to address the issue of ratification. In other words, they are not chosen by the voters with regard to a specific constitutional amendment.

Under the Japanese Constitution, there is dissolution of the House of Representatives under the parliamentary system. Japanese constitutional researchers hold that it is necessary to dissolve the Diet to ask the will of the people in cases where the issues were not reviewed by the people when the representatives were elected.

There is no provision regarding dissolution ordered by the Cabinet in the Japanese Constitution. By using Article 7<sup>37</sup> for the formal and ritual conduct of the Emperor and Tomabechi case, the Cabinet dissolved the parliament without a parliamentary motion of non-confidence against the Cabinet, as provided in Article 69.<sup>38</sup>

In contrast, the U.S. has a presidential system and no dissolution of the Congress.

Japanese constitutional researchers are of the opinion that the essence of the parliamentary system is that the cabinet owes responsibility to the Diet, which is selected by the people directly. Unlike the U.S. presidential system, which allows

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36. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 95 (Japan). A special law, applicable only to one local public entity, cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law.

37. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 7 (Japan). The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people: 3) Dissolution of the House of Representatives.

38. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 69 (Japan). If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives is dissolved within ten days.

the Congress to conflict with the President, the Japanese legislature and the executive power are required to work together to reflect the will of the people. This is called that the nature of the parliamentary system is accountability from the government to the Diet.

Constitutional law researchers also note that there is a limit to the Article 7 power of dissolution by the Cabinet. First, the important bill submitted by the Cabinet is not passed in the parliament, or the Cabinet shelves the bill. Second, the fundamental nature of the Cabinet is changed by political realignment. Third, there is a need to deal with new important issues that have not arisen in the general elections. Fourth, the Cabinet changes its fundamental policy drastically. Fifth, the term of members of the House of Representatives is nearly complete in which case arbitrary dissolution is prohibited.

### 3. Amendments to the U.S. Constitution

There are twenty-seven amendments to the U.S. Constitution, the last one occurring 203 years after the Constitution's signing. The number of amendment propositions by the Congress has been thirty-three. Two important propositions to amend the Constitution failed: the prohibition of child labor in 1924; and the equal protection amendment in 1982.

Professor Kawashima Masaki<sup>39</sup> explains that amendment for equal protection proposals acquired two-thirds in Congress in 1972, and the referendum proceeding went well, but did not obtain the requisite three-fourths. In 1982, the amendment proposal failed. In spite of this failure, the U.S. established gender equality through the affirmative action movement. Kawashima believes that this failure cultivated among American citizens a dialogue on gender equality.

### 4. Role of the President with Regard to the U.S. Constitution

There is no provision for Presidential veto during the process of U.S. Constitutional amendment; the President is excluded from the procedure, as the amendment process belongs to federal and state legislatures. Moreover, the President is prohibited from submitting a Constitutional amendment bill to the Congress.

Japan's parliamentary system provides that the Prime Minister is eligible to submit an amending bill to the parliament under Article 72.<sup>40</sup> The Prime Minister

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39. Kawashima Masaki, *Afamative Akushon no Yukue* [A History of Affirmative Action in The USA] (Nagoya: Nagoya University Press, 2014), 90, 161.

40. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 72 (Japan). The prime minister, representing the cabinet, submits bills, reports on general national affairs and foreign relations to the diet and exercises control and supervision over various administrative branches.

is the head of the ruling party. The greater number of the ministries must be members of the Diet, according to Article 68.<sup>41</sup>

Article 41 provides that the Diet is the sole and the highest government organ. The bills are submitted by members of the Diet and the ministries. The Diet deliberates freely to amend or abolish the bill. Hence, the grounds for the criticism of Hasebe and Arikawa that the cabinet decision in 2014 ignores deliberation in the parliament.

#### **IV: Limits of the Amendment**

##### **1. Limits of Amendment of the Japanese Constitution and Article 41 and the 2014 Cabinet Decision**

This section reviews whether the Japanese people can amend their Constitution to abolish its three basic principles: people's sovereignty, list of the fundamental rights, and pacifism. The governmental position isn't clear in this issue.<sup>42</sup>

The people's sovereignty has three meanings: the power of the government itself; the supreme and independent power; and the authority and power to decide national politics.

Parliament has the authority to pass statutes. The term "sole law-making organ" in Article 41 is understood to mean that the text of the statute is applied equally, generally to the people and cases. Referendums of the people are not allowed in passing statutes because this conflicts with the term "sole." The parliament may use a referendum for information in decision making, if it has no legal power to bind the Diet decision.

The term "highest" in Article 41 means that the Diet consists of members democratically selected by voters and is the central organ in passing statutes, independent of other organs.

The Cabinet decision of 2014 had the effect of reducing parliamentary democracy in name only.

##### **2. Amendment Proposal for Article 100 by the LDP**

Article 96 requires a two-thirds approval vote of the House of Representative and the House of Councilors to amend the Japanese Constitution. According to Professor Higuchi Youichi, most Prime Ministers, who were also the heads of the LDP, did not put proposals for the Constitution on their political agenda, until the

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41. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 68 (Japan). The prime minister shall appoint the ministers of state. however, a majority of their number must be chosen from among the members of the diet. The prime minister may remove the ministers of state as he chooses.

42. *Supra* note 14, at 308.

Party was defeated by election in 1993.

In April 2012, the LDP proposed an amendment to Article 96 to reduce the number of approvals, while it was out of power.

“Article 100. 1 Amendments to this Constitution shall be initiated by the members of the House of Representatives or the House of Councilors and resolved by the Diet, through a concurring vote of majority of all the members of each House, and shall thereupon be submitted to the people for ratification, which shall require approval of a majority of valid votes by referendum, as provided by law. 2. Amendments to this Constitution when so ratified shall immediately be promulgated by the Emperor.”

The LDP was established in 1955, and its leader Hatoyama Ichiro delivered the keynote address as Prime Minister, stating that part of the LDP’s agenda was to amend the Constitution. This 55 Years political system was a two-party system of government led by the LDP, with the Socialist Party in opposition, since 1955.

In 1953, Prime Minister Yoshida Sigeru ordered the CBL to consider the issues of amendments of Japanese Constitution; Kishi Nobusuke led the investigating committee. Kishi argued in parliament that Japan needed to establish its own Constitution.

In 1985, the LDP announced its political platform, and tried unsuccessfully to remove the term “Amendment of Japanese Constitution” from its agenda.

In 2005 and 2012, the LDP’s proposals for amendment emphasized that the Japanese national identity should be reflected (i.e., proclaiming the emperor as head of state, and addition of the duty of the people to respect the national flag and song). The protection of fundamental rights were respected only if it infringed the public interests and public order. The term Article 97<sup>43</sup> was deleted in the draft by the LDP.

### 3. Natural Law and Legal Positivism

In Japan, there are two camps of thought, for and against limits on Japanese Constitution amendments. The advocates against limits view the almighty constituent power which is original creator of the Constitution, and the power to amend Constitution as the same. Every provision of the Japanese Constitution has the same effectiveness—one amendment provision is the same as others. The Constitution faces the change of society. This camp is criticized, in that it allows

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43. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 97 (Japan). The fundamental human rights by this constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

Constitutional suicide.<sup>44</sup> The concept of natural law must be maintained.<sup>45</sup>

The other camp is for limits of Constitutional amendment. The constituent power is higher than the power to amend the Constitution, and cannot change basic principles such as people's sovereignty. The list of fundamental rights is based on dignity of the human, which is the root idea of the Constitution. Natural law holds that natural rights are given, including the inalienable right of life, liberty, and pursuit of happiness. Natural law sets limits on the power to amend the Constitution.

Legal positivists also think that the power to amend the Constitution is organized in Constitutional provisions. Fundamental change that loses identity is not permitted. Only deletions, additions, and corrections are permissible.<sup>46</sup>

#### 4. Essence of Power to Amend the Japanese Constitution

Two leading professors of Japanese constitutional law have explained the essence of amendment to the Japanese Constitution. According to Sato Koji,<sup>47</sup> there are three approaches to understanding the constituent power. First, the power to amend the Constitution is the same as the legislative power. Second, the power to amend Constitution is as same as constituent power, but not identical. The amendment provision of Article 96 has a legal norm that controls power after establishment of the Japanese Constitution. The power to amend the Constitution is a legally institutionalized power to establish a Constitution.<sup>48</sup>

Third, the power to amend the Constitution is new power that is not identical to constituent power. The power to amend the Constitution is a new legal power, through which the power to establish a Constitution is organized.

Sato denies the second approach, because if the power to amend the Constitution is identical to the power to establish the Constitution, the legal nature of the provisions of Article 96 is denied. Sato recommends the third approach, but is criticized as follows. According to Sato, once the amendment proposal begins, there are two kinds of people: people in constituent power, and people amending the Constitution. It is meaningless to tell one from another, and too technical an exercise to categorize a new third power.

Ashibe took Sato's second approach and concluded as follows:<sup>49</sup>

The "people's sovereignty" is the principle that we the people decide the

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44. *Supra* note 35, at 386.

45. Bernard Inagaki, *The Constitution Of Japan And The Natural Law* (Washington D.C.: The Catholic University of America Press, 1955), 9–15.

46. Ashibe Nobuyoshi, *Kenpo Seitei Kenryoku*, [The Power to Establish Constitution] (Tokyo: Tokyo University Press, 1983), 89–101.

47. Sato Koji, *Kenpo*, [Constitution] (Seibundo, 2011), 38–41.

48. Nonaka, Etl, *Kenpo I*, [Constitutional Law] (Yuhikaku, 2012), 23.

49. *Supra* note 35, at 387.

politics of the nation. The Japanese Constitution provides for a representative democracy, and its legitimacy as a democracy is derived from the people. The ultimate power to decide politics is to establish a Constitution. The power to establish a Constitution is grounded in the people's sovereignty. Once a Constitution is established, the power to establish Constitution is frozen into the Constitution itself. The power to amend the Constitution is legally organized within it, as in the amendment provision Article 96. The opportunity for legitimacy and power is combined, not separated from each other. After the Constitution is established, the people's sovereignty functions only in context of legitimacy. The only exception is that power works only through the provisions of Article 96. The power to amend the Constitution is Constitutionally institutionalized legal power.

After the development of these two perspectives,<sup>50</sup> various theories continued to evolve. Both Sato and Ashibe believe that change in sovereignty is not permissible, as it is not allowed to change the amendment provision, Article 96. The amendment procedure is only way to legally amend the Constitution, and the rules of conduct.

## V: Change to the Japanese Constitution

### 1. Change of Japanese Constitution

Most leaders of the LDP have intentionally not put issues of amendment and Article 9 on the party's political agenda, according to Higuchi Yoichi.<sup>51</sup>

"Change of Japanese Constitution" is defined as change to the meaning of the text in the Japanese Constitution without amendment procedure, by statutes, court decision, action by the house of the Diet, Cabinet, and other changes in circumstances that alter the essential meaning of provisions, making them different from the original.<sup>52</sup>

One Japanese constitutional researcher,<sup>53</sup> who studies Bruce Ackerman at Yale, thinks this change without amendment needs to be reviewed if changes in

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50. Before Ashibe's analysis, See. Miyazawa Toshiyoshi, *Zentei Kenpou* [Constitutional Law] (Nihonhyouronsha, 2012), 785, 788.

51. Higuchi Yoichi, *Ima Kenpo Kaisei Wo Dou Kangaeruka*, [How Consider Amdnement of Constituion Today] (Iwanamishoten, 2013), 57, 59.

52. Hashimoto Kiminobu, *Nihonkoku Kenpo*, [Constituon Of Japan] (Yuhikaku, 1980), 44-45, 438-40.

Ashibe Nobuyoshi, *Kenpo Seitei Kenryoku*, [The Power to Establish Constitution] (Tokyodaigaku Shuppankai, 1983), 142-8.

53. Ooe Ippei, "Ackerman No Nigenteki Minshusei Riron" [A Study of B. Ackerman's Dualist Democracy], *Kansai University Law Journal*, 50 (2001-2): 177.



Japanese constitutional politics occurs. Otherwise, informal amendment of Japanese Constitution is permitted.

Some Japanese constitutional researchers divide change into two types: ordinary change and Article 9 change.

Ordinary change is defined as governmental action beyond a certain norm of the Constitution, which lost normative validity and effectiveness.

With regard to Article 9 change, drastic change in Japan's status in international society requires change in the interpretation of Article 9. Second, the normative viewpoint of the Japanese general public has changed, gravitating towards approval of self-defense forces.

The difference between ordinary change and that of Article 9 is that the latter shifts the scope of interpretation limit, depending on circumstances, such as the intensification of the Cold War, or the occurrence of Korean War. Under the current international situation, the denial of self-defense power is not permissible. Japan now has a more participatory role in international society, which requires it to have its own self-defense force.

In the current context, Constitutional change without amendment appears to be an issue of recognition.<sup>54</sup> International society needs not only European, but Asian countries, as well, today. Japanese people support self-defense forces used for natural disasters, to save vulnerable people; this is not the original mission of the self-defense force, however.<sup>55</sup>

The criterion of change is not clearly fixed, and it should be subject to the process of Japanese amendment.<sup>56</sup>

## VI: Pre-commitment Constitution

The U.S. Constitution has certain limits for its amendment. First, the equal voting right in the Senate is taken away without the consent of the State under Article 5. Second, Clauses 1 and 4, Section 1 in Article 1 may not be modified.<sup>57</sup> The U.S. constitutional law scholars believe that this prohibits undemocratic amendment

### 1. The Hand of the Dead in Japan

It is said that the Japanese Constitution was established and has still been

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54. Ashibe Nobuyoshi, *Kenpo-Gaku*, [Study of Constitution] (Yuhikaku, 1992), 220–49.

55. Okudaira Yasuhito, *Kenpo Wo Ikiru*, [Living in Constitution] (Nihonhyoronsha, 2007), 168–70.

56. *Supra* Note 47, at 41–44.

57. Daniel Farber, *Lincoln Constitution* (Chicago: The University of Chicago Press, 2003), 144.

controlled by dead people. Professor Matsui Shigenori, who studied under Professor John Ely, clarifies that the Japanese Constitution is a process of the government, not a list of the fundamental rights.<sup>58</sup>

The Japanese Constitution has adopted a self-restraint concept called pre-commitment.<sup>59</sup> The Japanese people decide and control their destiny by themselves, but may fail in some cases. The Japanese Constitution should work to bind people's own ultimate power. Japanese people must adopt mid-and long-term perspectives, accepting that humans make mistakes. The government established by the people may work in arbitrary and capricious ways. The fundamental rights listed in the Constitution are basic principles intended to protect from governmental infringements.

## VII: Supremacy of the Law

### 1. Who is the Supreme Interpreter

Abe once noted that he was the final and supreme interpreter of the Japanese Constitution,<sup>60</sup> and he left a good lesson for constitutional studies. If the Japanese Constitution is for Japanese people, every citizen can interpret its provisions, and Abe can freely interpret as a private citizen. The interpretation by public officials is different from that of the general public, however. Article 99<sup>61</sup> stipulates that public officials shall maintain order under the Japanese Constitution. The Prime Minister is not obligated to review whether his own power infringes the Constitution. The Constitution binds an official's exercise of power delegated by the people. Officials in executive branches are required to observe the command from higher branches, unless it is clearly un-constitutional.

The widest scope of interpretation is allowed to judges in the judiciary.<sup>62</sup> The narrowest is the Emperor, who is the symbol of the Japanese people<sup>63</sup> and who has no political power.

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58. Matsui Shigenori, *Nihonkokukenpo*, [Japanese Constitution] (Yuhikaku, 2007).

59. Sakaguchi Shojiro, *Rikkennshugi To Minshushugi*, [Constitutionalism and Democracy] (Nihonhyoronsha, 2007).

60. February 14, 2014. At budget committee of the house of representative.

61. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 99 (Japan). The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution.

62. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 76(3) (Japan). All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

63. Nihonkoku Kenpo [Kenpo] [Constitution] Art. 1 (Japan). The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.

Japanese courts are expected to fill the gap between the general public and the text of Constitution, as do U.S. judges. Unlike the U.S. federal and state judiciary, however, Japanese judges in inferior courts are not chosen by voting, but appointed by the Cabinet after training at the Legal Training and Research Institute of the judiciary.

### **Conclusion: The duty of the Constitutional Law Scholar**

It is incorrect to say that it is difficult to amend the Japanese Constitution, and easy to amend the U.S. Constitution, as the current comparative review shows.

The U.S. President has veto power over the Congress for statutes, but not for the Constitutional amendment. The federal and state legislature are exclusively engaged; and the U.S. president cannot dissolve the legislative bodies.

In Japan, a bill to amend the Japanese Constitution must be submitted by each house of the Diet. The Japanese Constitution does not have a federalism system. Chapter 8 recently provided for the autonomy of local governments in the Japanese Constitution. The Cabinet is eligible to submit a bill for statutes, but local government has no role in amending the Constitution except under Article 95. Under the Japanese Constitution, there is dissolution of the House of Representatives under the parliamentary system. Japanese constitutional researchers think it is necessary to dissolve the Diet to ask the will of the people in cases where the issues were not reviewed by the people when the representatives are elected.

It is not simple to compare these two different systems. One common characteristic is that election by the people is the base of democracy, and people vote to show their wills. As a difference between the two, under Japan's parliamentary system, the Cabinet has exercised the power to dissolve the parliament under Article 7.

Does Japan struggle with the amendment of its Constitution, compared with the U.S.? The Japanese Constitution lists fundamental rights in Articles 10 to 40 and is understood to limit and protect against the arbitrary and capricious exercise of power, creating a system of government called Constitutionalism. The people's sovereignty is the principle that the people decide and accept their governing decisions, even though they may be found to be wrong in the long run, bound by Constitution. The decisions rendered by the courts are also a part of law, binding the judges as case law, as the rule of law.

The supreme power to interpret the Constitution is not with the Cabinet, but with the Japanese Supreme Court. Public announcements by the CBL must work objectively in the long term and are not subject to political power. The Japanese Supreme Court is expected to send messages through its decisions to gain the confidence of the people, bridging the gap between the judiciary and the general public.

Japanese Constitutional scholars have often been asked if they have cultivated discussions on amendments to the Constitution. This is something that only Japanese Constitutional scholars can do in order to bridge the gap between the public and the Constitution.