The Research Commission on the Constitution and the Upper House Issue

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I. THE ESTABLISHMENT, PURPOSE, AND STRUCTURE OF THE RESEARCH COMMISSION ON THE CONSTITUTION

In 1997 Japan celebrated the 50th anniversary of its Constitution. In the same year, a movement toward "research of the Constitution" was started by a cross-over Diet group. Informal negotiations on the forming of a "new" research commission[1] took nearly two

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[*] This article is based on the developments until March 2005. In the meantime a report has been published and the Special Committee for Research on the Constitution of Japan was set up.

1 The current Research Commission on the Constitution is not the first parliamentary-approved constitutional research commission in postwar Japan. In 1956 the Law for the Commission on the Constitution (LCC; *Kenpô chôsa-kai-hô,* Law. No. 140; Engl. transl.: J.M. MAKI, Japan's Commission on the Constitution [Seattle et al. 1980]) was enacted by the Diet, laying the foundation for the "Commission on the Constitution." According to Art. 2 LCC, the purpose of the Commission was "to study the Constitution of Japan, to investigate and deliberate on related problems, and to report the results to the Cabinet and through the Cabinet to the National Diet." The Commission on the Constitution should have been made up by 30 Diet members and 20 persons of learning and experience. The Diet parties had the opportunity to nominate candidates in relation to their parliamentary strengths. However, the JSP (later: SDP) and – after the 1962 Upper House elections – also the *Kômei-kai* (later: *Kômei-tô*), due to their opposition to the Commission on the Constitution, refused to cooperate and did not nominate any candidates. In the end only 39 instead of 50 members were appointed. The LDP sent 18 members, and the conservative *Ryokufû-kai* sent 2. Nineteen persons of learning and experience completed the Commission. The deliberations finally resulted in the drafting of the final report to the Cabinet and the Diet. The 1161-page final report was submitted to then Prime Minister Hayato Ikeda on July 3, 1964. The Prime Minister's answer was that the Cabinet would discuss the report and then

years. Finally, in February 1999, this movement led to a proposal to establish the Research Commission on the Constitution (*Kenpô chôsa-kai*). This proposal was supported by five parliamentary parties: the Democratic Party of Japan (DPJ), New Komeito (NK), Reformers' Network Party (RNP), the Liberal Democratic Party (LDP), and the Liberal Party (LP).[2] Negotiations among those parties were tough. Political interests of various groups had to be respected – not only the interests of the five initiating parties, but also those of the anti-revisionist fractions such as the Social Democratic Party (SDP) or the Japanese Communist Party (JCP) – since the Diet wanted to avoid a scenario similar to the one which the LDP faced in the 1950s. In the late 1950s, the LDP could not find other supporters for its constitutional research commission and thus had difficulties to establish a commission which could be accepted as an unbiased and impartial study group.[3] Although this time the situation was slightly different due to the basic support by ruling parties as well as opposition parties, compromises had to be made in order to unite all parties of the Diet in the project, causing a limitation on the actual efficiency of the Commission. One of the most striking aspects was that the Commission would not have the authority to submit bills.[4]

The five-party proposal underwent a bureaucratic process until the Commission was finally established on January 20, 2000, the opening day of the 147th parliamentary session.[5] The planned period for the research work was five years. In contrast to the

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pass it on to the Diet for further discussions. However, the report of the Commission has never been passed on to the Diet nor has the Cabinet given a relevant statement on the final report to the Commission. Ikeda followed Nobusuke Kishi as Prime Minister. Apart from the missing two-thirds majority of the LDP, the movement against the Self-Defense Forces can be called a reason for the failure of the Commission. Kishi was the co-initiator of the "Treaty of Mutual Cooperation and Security between Japan and the United States of America" which supported the existence of the Japanese Self-Defense Forces. However, he had to resign because of growing public criticism of the treaty. Ikeda wanted to avoid delicate issues such as the constitutional revision and tried to focus the political attention on economic issues.

2 The coalition government (LDP, LP, and, since Oct. 5, 1999, NK) as well as some opposition parties (DPJ, RNP and, until Oct. 5, 1999, NK) showed interest in such a commission from the very beginning.

3 See *supra* note 1.

4 The Commission of 1957 did not have such authority either.

5 The proposal went from the Secretaries-General of the initiating parties to the Chairman of the Rules and Administration Committee of the House of Representatives (March 1999), who asked the Speaker of the House of Representatives to pass it on to his advisory body, the Council on the Parliamentary System. After going through the proposal, this council submitted a report in response (May 1999), which was sent to the Rules and Administration Committee. In accordance with the report, one subcommittee within the Rules and Administration Committee, the Subcommittee on Amendment to the Diet Law, worked out a bill for amending the Diet Law to establish the Research Commission. Besides, it drafted the Regulations of the Research Commission on the Constitution (June 1999) which should become the basis for the structure and competences of the study commission. The House of Representatives accepted both; the House of Councilors amended the bill and established a

Commission of 1957, which was established within the LDP Cabinet, the Research Commission on the Constitution was set up directly by the Diet.[6]

The purpose of the Commission is described by Arts. 1 and 2 RRC. Art. 1 says that "the Research Commission on the Constitution shall conduct broad and comprehensive research on the Constitution of Japan." According to Art. 2 (1), the Commission "shall prepare a written report on the process and the result of the research upon completion of the research, and the Chairman of the Commission shall submit it to the Speaker [note: of the House of Representatives]." The purpose of the Commission of 1957 was regulated in a similar way; the final report, however, was to be submitted to the Cabinet instead of the Speaker.

The written final report should be considered as a constitutional draft, as the Commission has no competence of drafting a constitutional amendment, let alone a totally new constitution. This was an important compromise in order to guarantee that all political parties with seats in the Diet would participate in the Commission.

It must be said, however, that the official and legally prescribed purpose of studying the Constitution without having a draft competence is not respected by all members. In particular, many commissioners of the revision-friendly LDP take a different view. Former Prime Minister and LDP commissioner Yasuhiro Nakasone, for example, gave the following comment: "The Commission should spend two years discussing the Constitution. In the following three years, the political parties should each present their proposals for a revision. This Commission must act as the driving force in this process."[7] Not only LDP commissioners, but also several other Commission members from coalition parties shared this view, e.g., Takeshi Noda, member of the LP:

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similar commission itself. On July 29, 1999, this bill was finally approved by the House of Representatives and was promulgated on August 4, 1999.

6 Under the Law for the Commission on the Constitution, the Commission members were appointed by the Cabinet; the final report was submitted to the Cabinet from where it was to be handed over to the Diet. The Regulations of the Research Commission on the Constitution of the House of Representatives (RRC, *Shûgi-in kenpô chôsa-kai kitei*; Engl. transl.: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/regulation.htm*>), however, gave the power of appointing the members to the Lower House itself (Art. 4 [1] RRC) which was to distribute the seats among "the political parties and groups in the Lower House according to their numerical strength" (Art. 4 [2] RRC). The final report on the process and the result of the research was to be submitted to the Speaker of the House of Representatives after the completion of the research (Art. 2 [1] RRC).

7 Plenary session on April 27, 2000, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>). Even if one does not understand this opinion in such a way that the Commission itself should have the competence to draft an amendment, one cannot deny that using the Commission as "a driving force" by discussing various proposals for revision and commenting on them in fact resembles the act of creating a draft.

> "A very concrete timetable should be established concerning the deliberations, and this Commission should arrive at some very clear conclusions. For instance, the Commission should present the outline of a new constitution in the third year of its deliberations, and the new constitution should be adopted in the fifth year".[8]

Others ask for the establishment of a permanent constitutional body within the Diet. Nobuyuki Hanashi (LDP), for example, said that "one should consider establishing a permanent body within the Diet to constantly examine the various issues that emerge from a constitutional perspective."[9]

The concrete deliberations started with general discussions and investigations of general issues of the constitutional debate, the research methods of the Commission, and the genesis of the Constitution of Japan (in the following: Constitution or JC).[10]

Later the discussion moved on to specific articles of the Constitution. The debates first took place in the plenary sessions before being transferred to the subcommittees. The deliberations included the preamble, the Tennô system, national security and international cooperation (with the central provision Art. 9), fundamental human rights, the Diet, the Cabinet, the judiciary, finance, local self-government, and constitutional revision among others.

The Research Commission on the Constitution is made up of 50 members.[11] Unlike the members of the Commission of 1957, all commissioners are members of the House of Representatives and not "external" experts.[12] The 50 seats in the Commission are allotted to "the political parties and groups in the House in proportion to their numerical strength" (Art. 4 [2] RRC).

The Commission is led by a chairman, who shall "arrange the business of the Commission, maintain order in it, and represent it" (Art. 6 RRC) and "shall be elected by its members from among themselves" (Art. 5 [1] RRC). Against initial plans to offer this position to the largest opposition party, Taro Nakayama of the ruling LDP, the party with the most members in the Commission, was chosen as chairman due to the numerical absolute majority of coalition seats in the Commission. He has been the only chairman of the Commission so far.

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8 Plenary session on February 17, 2000 published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>).

9 Plenary session on Apr. 17, 2003, available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/20030417.htm*>.

10 *Nihon Kenpô-hô,* November 3, 1946, Engl. transl.: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/constitution.htm*>.

11 Art. 3 LCC: "The Commission shall be composed of not more than 50 members. The members shall be appointed … among the groups listed below and within the limit of the numbers set forth. Diet members: 30; persons of learning and experience: 20 …"
Art. 3 RRC: "The Research Commission on the Constitution shall consist of 50 members."

12 Art. 4 (1) RRC: "Members of the Commission shall be appointed by the House at the beginning of a session, and shall hold their membership until their term of office as Members of the House expires."

In order "to consult on the management of the Commission," "the Chairman may hold a meeting of directors" (Art. 7 [2] RRC); according to Art. 7 (1) RRC the directors are elected from among the Commission members. As a gesture of fairness to the opposition parties, a further position was created, the position of the "deputy chairman." This deputy chairman, a member of the largest opposition party, can be seen as a "head director," taking over the Chairman's responsibilities in case of absence of the Chairman.[13]

One more assisting body which was formed is the "Office" run by the "Director General of the Office" under the guidance of the Chairman of the Commission (Art. 24 [3] RRC). The purpose of the office is "the handling of the Commission's business."[14] This includes administrative functions in a broader sense, e.g., public relations or the handling of general matters concerning the Commission and its meetings. Consulting on the management of the Commission, however, is carried out by the meeting of directors (Art. 7 [2] RRC).

Like the Commission of 1957, the Research Commission on the Constitution decided to install subcommittees[15] with the purpose of "promoting specialized and effective research on the individual points at issue regarding the Constitution of Japan."[16] Each subcommittee consists of 18 members; every party which is represented in the Commission has at least one seat per subcommittee. The first four subcommittees were: the Subcommittee on the Guarantee of Fundamental Human Rights,[17] the Subcommittee on the Fundamental and Organizational Role of Politics,[18] the Subcommittee on Japan's Role in the International Society,[19] and the Subcommittee on Local Autonomy.[20] After publishing the Interim Report in November 2002, the Research Commission on the Constitution decided to install three additional subcommittees on January 30, 2003. The three new subcommittees were the Subcommittee on the Ideal Constitution as Supreme Law,[21] the Subcommittee on Security and International Cooperation,[22] and the Sub-

13 The decision to install a "deputy chairman" was made in the directors' meeting of the Rules and Administration Committees of the House of Representatives held on July 6, 1999, at the same time when it agreed on establishing the Research Commission on the Constitution. However, no provision regarding the deputy chairman can be found in the Regulations of the Research Commission on the Constitution.

14 Art. 24 (1) RRC: "An Office shall be established in the Research Commission on the Constitution to handle the Commission's business."

15 Art. 8 (1) RRC: "The Commission may set up subcommittees."

16 See RESEARCH COMMISSION ON THE CONSTITUTION, Interim Report (Tokyo 2002) 13 (available at <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>).

17 First meeting on Feb. 14, 2002.

18 First meeting on Feb. 14, 2002.

19 First meeting on Feb. 28, 2002.

20 First meeting on Mar. 28, 2002.

21 First meeting on Feb. 6, 2003.

22 First meeting on Feb. 6, 2003.

committee on the Ideal Government and Organizations.[23] The subcommittees have to be seen as the heart of the constitutional debate. With the establishment of the subcommittees in January 2002 and January 2003, the discussions shifted to a large extent from the plenary sessions to the subcommittees, in which clearly defined topics are deliberated with the help of external experts ("informants")[24] who – in contrast to the legal experts of the 1957 Commission – are not permanent Commission members. The efficiency of the subcommittees lies in the fact that each of them can concentrate on clearly defined constitutional areas. Now the purpose of the plenary sessions, on the other hand, was to deal with general topics, including brainstorming discussions concerning constitutional matters, summaries of open hearings, and plenary debates about the findings of the subcommittees and the sending of delegations abroad to study foreign constitutions and political systems.

II. THE UPPER HOUSE – THOUGHTS ON THE BICAMERAL SYSTEM

1. Introduction

The Japanese House of Councilors (*Sangi-in*) has been subject to heavy debate since the creation process of the Japanese Constitution and is currently subject to discussions as part of the "political sector topic" in the Subcommittee on the Ideal Government and Organizations and in various plenary sessions of the Commission. In this context, the commissioners and external informants deal with two areas in particular. One is the bicameral system, and the other is the electoral system for the Upper House. These two issues are closely related to each other. One of the main reasons for the debate was the electoral reform in 1994 which brought distinctive changes for the Lower House elections. This and the fact that the bicameral system can be seen as something which was initially not "proposed" by the Allied Powers, but asked for by the Japanese side, makes it an interesting topic for closer examination.

2. The Establishment of the Upper House under the Japanese Constitution

Japan's first Parliament, the Imperial Diet, was established under the Meiji Constitution.[25] This is one of the reasons why the Meiji Constitution can be called a "modern constitution"[26] despite the strong position it provided for the Tennô. The Imperial Diet was based on a bicameral system. It was made up of two houses with more or less equal

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23 First meeting on Feb. 13, 2003.

24 Prior to the inauguration of the subcommittees, the external experts advised the commissioners in the plenary sessions.

25 *Dai-nihon teikoku kenpô*, promulgated February 11, 1889; Engl. transl.: <*http://history.hanover.edu/texts/1889con.html*>.

26 T. MIYAZAWA, Verfassungsrecht (Kempô) – translated by R. Heuser and K. Yamasaki – (Köln et al. 1986) 158.

powers, the House of Representatives and the House of Peers. Only the members of the House of Representatives were elected by the people; members of the House of Peers were the Imperial Family, noblemen, and Tennô appointees.

The defeat in World War II and the Potsdam declaration as its result led to far-reaching changes in Japan's political system. The Tennô lost his power, and sovereignty was passed to the people. The House of Peers as a symbol for Japan's imperialism had to be abolished in order to accomplish the goal of empowering the people. However, the Allied powers in the form of the General Headquarters (GHQ) under the direction of the Supreme Commander for the Allied Powers (SCAP) General Douglas MacArthur and the Japanese side had different views about the future of the Japanese Parliament.

The Japanese Committee to Study Constitutional Problems (CSCP)[27] under the direction of Jôji Matsumoto, State Secretary and former professor at Tokyo University, came to the conclusion that the bicameral system should be retained. According to the Committee's plans, the new Upper House[28] was to be made up of elected members as well as members appointed by the Tennô, a plan which shows the pro-imperialistic attitude of the CSCP members. We could call this form a "semi-elected Upper House." The CSCP also intended to give up the balance of powers between the two houses in favor of a system with a strong House of Representatives and a subordinate House of Councilors. The final decision in the legislative process regarding the budget in cases of difference of opinions between the two houses was to come under the authority of the House of Representatives as a concession to the principle of sovereignty of the people.

MacArthur and the GHQ, however, were of the opinion that a unicameral system was to be preferred because of its simplicity and its suitability for the Japanese political condition.[29] This proposal was part of the GHQ draft which was handed over to the Japanese side in February 1946. It said that "the Diet shall be the highest organ of state power [note: under the Meiji Constitution, the Tennô was the highest organ of state power[30]] and shall be the sole law-making authority of the State."[31] According to the

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27 The CSCP was established under Prime Minister Kijurô Shidehara on Oct. 25, 1945, to critically investigate the Meiji Constitution. Although drafting a new constitution was not its purpose, the commissioners soon made the decision that drafting a constitution would be inevitable.

28 I.e., the former House of Peers.

29 R. ELLERMAN, Ellerman Notes on Minutes of Government Section, Public Administration Division Meetings and Steering Committee Meetings between February 5 and February 12 inclusive (Tokyo 1946) 2.

30 See Art. 1 Meiji Constitution, "The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal," and Art. 4 Meiji Constitution, "The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution."

31 Art. 40 GHQ draft – see, e.g., D.H. HELLEGERS, We, the Japanese People: World War II and the Origins of the Japanese Constitution (Stanford 2001) 687, T. MCNELLY, The Origins of Japan's Democratic Constitution (Lanham 2000) 182 or H. HATA / G. NAKAGAWA, Constitutional Law of Japan (The Hague 1997) 55.

draft, the single House of Representatives was to be made up of at least 300 and not more than 500 members[32] elected by the people. Peerage was to be totally abolished. Disputes within the Parliament were not expected to occur due to the unicameral system.

The Japanese side did not want to accept[33] the proposal of a unicameral system and thus tried to convince the Allied powers of the necessity to retain a bicameral system based on the arguments that many Western countries used a bicameral system to secure stability and that a change to a unicameral system would increase the instability of Japanese politics as Japan was not used to a single-house system. Yet it became obvious for the Japanese side that the general principles put forward in the GHQ draft had to be complied with, in order to retain the status quo in form of a bicameral system.

The foundation for the new bicameral system was laid in the beginning of March 1946, when both sides negotiated the Outline of a Draft for a Revised Constitution at the GHQ's office. Retaining a bicameral system was agreed on, albeit in a different form. The wording of what was to become Art. 43 (1) JC was accepted by both sides. It said that "both Houses shall consist of elected members, representative of all the people." In addition to this, further details were laid down by Art. 43 (2) ("The number of the members of each House shall be fixed by law.") and Art. 44 ("The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.").[34] The Japanese side was successful with its demand for a bicameral system. The Allied powers, on the other side, were able to strengthen the sovereignty of the people by eliminating the possibility of a Tennô-appointed Upper House.

During the discussions about the constitutional draft in the Imperial Diet, the Japanese side made some interesting comments concerning the structure of the Upper House which would be fixed later by law. Similar comments can be found in the deliberations of the Research Commission on the Constitution. For example, Tokujirô Kanamori, Minister of State, stated that the House of Councilors should be made up of highly skilled statesmen with knowledge and experience to control the House of Representatives. Others pointed out that the House of Councilors should not have the same compo-

32 Art. 41 GHQ draft.

33 See, e.g., S. KOSEKI, The Birth of Japan's Postwar Constitution (Boulder 1997) 103 *et seq*.

34 Some other relevant provisions for the ongoing debate in the Commission include Art. 45 ("The term of office of members of the House of Representatives shall be four years. However, the term shall be terminated before the full term is up in case the House of Representatives is dissolved."); Art. 46 ("The term of office of members of the House of Councilors shall be six years, and election for half the members shall take place every three years."); Art. 47 ("Electoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law."); and various articles on the responsibilities of the two houses.

sition to that of the House of Representatives.[35] Such opinions are still of topical interest in the debates about the necessity of a bicameral system[36] and the ideal structure of the Upper House.

3. The Structure and Electoral System of the Upper House

Until 1950 the Upper House elections were regulated by the Upper House Election Law.[37] In 1950 the Upper House elections as well as the Lower House elections were codified in the new Public Offices Election Law.[38]

The Upper House followed the House of Peers of the Imperial Diet. The major change in its structure was the introduction of members elected by the people in general and direct elections. The electoral systems for both houses were heavily debated in the Diet; the common opinion was that two different electoral systems should be adapted. Finally, a division into local and nationwide election districts was agreed on. Under the current system, 96 members are elected on the basis of proportional representation in a single nationwide district. The remaining 146 seats are subject to personal elections in 47 prefecture-level districts. The total number of members in the Upper House was reduced from 252 to 247 in 2001 and to 242 in 2004.

The term of membership is six years. However, elections take place every three years, when half of the seats are redistributed. Voters have to make two decisions. While the distribution of the 48 nationwide seats is decided by a system of proportional representation, 73 seats are allocated to politicians in personal elections. In every prefecture at least two and at most eight politicians are chosen by the latter system. Due to the electoral reform of 2004, the prefectures of *Kagoshima*, *Kumamoto,* and *Okayama* lost two "personal seats" each.

Japanese gain the right to vote at the age of 20 and eligibility to the Upper House is obtained at the age of 30, five years later than the eligibility for the House of Representatives.

4. The Elections for the House of Representatives

In order to understand the ongoing debate better, one should also take a look at the electoral system for the House of Representatives.

The electoral reform of 1994 brought major changes for the elections to the House of Representatives. Some central subjects of discussion in the Research Commission on the Constitution date back to this reform. Until the LDP lost its governmental power,

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35 See <*http://www.ndl.go.jp/constitution/e/ronten/04ronten.html*>.

36 A critical comment on the Japanese parliamentary system can be found, e.g., in W. RÖHL, Die Verfassungen der Welt – Japan (Frankfurt 1963) 115 *et seq*.

37 *Sangi-in giin senkyo-hô*, Law No. 11/1947

38 *Kôshoku senkyo-hô*, Law No. 100/1950

Japan was divided into multi-seat medium-sized electoral districts. At least two and at most six members of the House of Representatives were directly elected per district. Parties could nominate several candidates in each district. Compared with single-constituency systems, the chances for smaller parties and independent candidates were relatively high. Besides, the possibility of nominating more than just one candidate led to the creation of factions within the parties.

The new eight-party coalition[39] under the leadership of Morihiro Hosokawa and later Tsutomu Hata led to the electoral reform of 1994, which brought a fundamental change of the electoral system. The reduction of the total amount of seats from 511 to 500 was generally accepted. The multi-seat constituencies were to be replaced by a mixed system of proportional representation and single constituencies. The ruling coalition strongly favored the former, as it is usually beneficial to smaller parties because the voters' will is relatively "correctly" reflected in the distribution of the seats; a single-constituency-based system, on the other hand, has quite a high rate of "dead votes," which means that many votes remain excluded in the composition of the representative body. However, the SDP, a member of the coalition, decided not to support the reform plans. Thus, the government needed the assent of the LDP, which found itself in the role of an opposition party for the first – and, until now, only – time since 1955.[40] The LDP initially demanded the establishment of 500 single constituencies. After long negotiations, a compromise was finally made which led to the introduction of eleven nationwide electoral districts with a total number of 200 seats based on proportional representation and 300 single-seat electoral districts. The minimum number of seats in the 11 nationwide districts is 6, and the maximum is 30. While politicians are directly elected in the single constituencies, the voters choose parties in the 11 proportional districts. The seats in the nationwide districts are allocated to the parties in proportion to the outcome of the election by using the d'Hondt method.[41]

The electoral reform of 2000[42] weakened the proportional representative element by cutting the 200 proportional seats to 180.

The electoral changes show that the initial goal of adapting two different electoral systems for the two houses could not be reached. Taking a closer look at the election results since the reform came into effect, one can see a development toward an increas-

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39 See, e.g., M. KOHNO, Japan's Postwar Party Politics (Princeton 1997) 135. (The "Democratic Reform Party," which only had seats in the Upper House, was the eighth party in the coalition; Kohno does not mention this party in his book.)

40 The LDP was formed in 1955 when the Liberal Party and Democratic Party merged; see, e.g., R.J. HREBENAR, Japan's New Party System (Boulder 2000) 94 or R. SIMS, Japanese Political History since the Meiji Renovation 1868 – 2000 (London 2001) 274 *et seq*.

41 See, e.g., <*http://www.fpcj.jp/e/shiryo/jb/j26.html*>; the rationale behind the d'Hondt method is to allocate seats in proportion to the number of votes a list receives, by maintaining the ratio of votes received to seats allocated as closely as possible. This makes it possible for parties having relatively few votes to be represented.

42 This reform was initiated by the LDP-led coalition government.

ing similarity of the political composition in both houses. Smaller parties are losing their significance due to the weakening of the proportional system. Gradually, a two-party system seems to be emerging. The co-ruling New Komeito Party will play a decisive role in the further development as the third biggest party in Parliament. One can find several interesting proposals and ideas regarding the bicameral parliamentary system and the structure of the houses in the research and deliberation work of the Commission.

5. Comments on the Upper House Issue

As far as the bicameral system itself is concerned, only few Commission members question its necessity and benefits. Most commissioners and informants who oppose the current bicameral system argue that both houses resemble each other too much. However, according to the vast majority of the participants in the discussion, changing the bicameral system into a unicameral one would not make things better.

In general, the idea of having two parliamentary houses is supported by the commissioners. The questions of whether the current position of the House of Councilors is too strong and whether or not its members should be elected in general elections by the people are nevertheless heavily discussed in the Commission. Some commissioners argue that the fact that the Upper House cannot be dissolved in combination with its legislative powers might cause problems for the government if it cannot secure a strong majority in both houses. This opinion is logically supported by some members of the ruling parties, who are afraid that sharing the governmental power would mean that too many allowances have to be made. Even some informants see the relatively strong position of the Upper House as a problem. For example, Yasuo Hasebe, professor at Tokyo University, stated that

> "the House of Councilors has comparatively strong powers in the passage of legislation, and in order to run a government, the ruling party must also secure a majority in the House of Councilors, so the true value of the bicameral system is blunted; in order to really give life to the bicameral system, we might consider reducing the constitutional powers of the House of Councilors".[43]

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43 Plenary session on Nov. 8, 2001 published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>). However, one can also say that the double-check characteristic of a bicameral system, due to a relatively strong Upper House, is a significant benefit. In countries in which the structure of the two houses is different and in which the members of both houses represent different fields of interests, the legislative contribution of the Upper House can guarantee that a decision is made which is the best possible compromise for all affected persons. On the one hand, compromises made due to a relatively equally strong Upper House can, of course, be seen as an obstacle to the governmental power; on the other side, however, they can be considered as a regulating means which protects opposite and minority interests. The question of whether or not a

He added that

> "if [note: under a system with a weak Upper House] the House of Councilors should fulfill its function as the 'chamber of reason' (*ri no fu*),[44] then it must be secured as a place where the power of the political parties does not really reach …; for that purpose, a certain number of members representing a diversity of backgrounds should be selected to join".[45]

On behalf of some informants, Makoto Ôishi, professor at Kyoto University, asked for a limitation of powers of the Upper House which should lead to the "sole right of the House of Representatives to designate the Prime Minister"[46] or to "a change from the required two-thirds majority in the House of Representatives to a simple majority if the two houses do not agree on the passage of a bill."[47]

Others believe that the powers of the House of Councilors are important for a system of checks and balances. However, some commissioners see the current electoral system as an obstacle to the realization of this purpose. Hajime Funada (LDP), for example, argued that "it was anticipated that the bicameral system would function as a kind of double-check, but at present it is pretty hard to say that this function is working effectively."[48]

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relatively strong Upper House "blunts the value of the bicameral system" depends on how one sees the Upper House. Shall it be a balancing power or not? Various continental European countries have comparatively strong Upper Houses and still appreciate such a bicameral system of checks and balances, although the decision-making process takes longer than in a unicameral system or in a system with a weak Upper House. Makoto Ôishi, for example, expressed that "… in many European countries it has become customary for governments to revise proposed legislation in order to incorporate the opinions of the Upper House. So there are certainly examples of bicameral systems [note: with a relatively strong balance of powers system] that are functioning quite well." (Subcommittee on the Fundamental and Organizational Role of Politics on Apr. 11th, 2002).

44 Y. HASEBE, *Kenpô* [Constitution] (3rd ed., Tokyo 2004) 347.

45 Plenary session on Nov. 8, 2001, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>). If you look at this comment from a constitutional standpoint, such a composition of the Upper House might be questionable due to Art. 43 (1) ("Both Houses shall consist of elected members, representative of all the people.") and Art. 44. ("The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.").

46 Subcommittee on the Fundamental and Organizational Role of Politics on Apr. 11, 2002, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/ interimreport.htm*>).

47 Subcommittee on the Fundamental and Organizational Role of Politics on Apr. 11, 2002, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>).

48 Plenary session on May 11, 2000, published in: Interim Report of the Research Commission

A couple of commissioners and informants ask for a clearer division of roles between the two houses instead of retaining the status quo. According to them, the characteristics of both houses should be brought out by giving them more independent powers. Various proposals have been made by members of the Commission regarding more or less autonomous functions of the Upper House, including the introduction of "privileged review rights in the approval process of international agreements," "approval rights of various state personnel," "audit rights," or "deliberation rights weighted towards medium- and long-range topics in combination with an extension of the term of office."

The structure of the Upper House is a further point of interest in the Commission's research work. Although the vast majority of Commission members and informants favor elections for both houses, some think that the composition of the Upper House should totally differ from its counterpart, the House of Representatives. A minority opinion prefers a House of Councilors made up of experts from various professional fields. Others who are skeptical of an elected Upper House argue that a way must be found to guarantee its independence. It should be seen as a "critical think-tank, independent of the ideology of the ruling party" (Jirô Yamaguchi*;* informant),[49] as a house "composed of representatives who do not receive political party backing" (Kôsuke Itô*;* LDP),[50] or as a "chamber of reason as a place where the power of the political parties does not really reach … with a certain number of members representing a diversity of backgrounds" (Yasuo Hasebe).[51]

The issue of the electoral system is obviously the key point in this context. Nearly all of the above-mentioned related issues were raised because of the similarity of the composition of both houses. As the electoral principles are regulated by the Constitution, major changes of the electoral system could interfere with the current Constitution. Taking a closer look at the ongoing debate, however, one can see that the major points of interest are the layouts of the electoral systems for both houses. This central topic is closely related to the Constitution itself.

The electoral reform can be said to be the bone of contention as it led to the mixed use of proportional representative elements and elements of majority vote in both houses. Commissioner Kansei Nakano (DPJ) got to the heart of the problem by saying

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on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>).

49 Subcommittee on the Fundamental and Organizational Role of Politics on Mar. 14, 2002, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>).

50 Subcommittee on Ideal Government and Organizations on Jul. 10, 2003, available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/20030710gof.htm*>.

51 Plenary session on Nov. 8, 2001, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>).

that "at present the electoral systems for the two Houses are much too similar, which … undermines the significance of the bicameral system".[52] Smaller parties especially criticize the single-seat constituencies used in the Lower House elections. They argue that such an "all or nothing" majority system could not reflect the will of the people in a fair way and would lead to a two-party system. Although several members demand a limitation of powers of the Upper House to solve the "twin houses' conflict," the majority favors two different voting systems for both houses. Commissioner Masayuki Fujishima (LP) put it this way:

> "[B]oth houses reflect the will of the people and both have adopted similar electoral systems, so … we should not create a gap between their relative powers. We should consider what sort of electoral system might be appropriate from the standpoint of the House of Councilors serving as a moderating influence on the dynamism of the House of Representatives".[53]

A central matter of concern for the Research Commission on the Constitution is the wish for a stronger involvement of the people in the political process. One can find expressions such as "election law in a practical sense forms a part of constitutional law; we should discuss the ways in which both Houses can be made to more accurately reflect the will of the people" (Satoshi Shima; DPJ),[54] or "the issue at the very root of politics is how to achieve the closest possible connection with the citizens" (Tarô Nakayama; LDP).[55] The deliberations of the Commission show that two important factors should be taken into account in the constitutional debate of the Upper House: one is the will of the people; the other is a different voting system for both houses. The combination of these two principles can be called the "ideal electoral system issue" which is debated in the Subcommittee on the Fundamental and Organizational Role of Politics.

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52 Subcommittee on the Fundamental and Organizational Role of Politics on Apr. 11, 2002, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/ interimreport.htm*>).

53 Subcommittee on the Fundamental and Organizational Role of Politics on Apr. 11, 2002, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>).

54 Subcommittee on the Fundamental and Organizational Role of Politics on Apr. 11, 2002, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>).

55 Subcommittee on the Fundamental and Organizational Role of Politics on Apr. 11, 2002, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>).

6. An Alternative Proposed Solution for the Upper House Problem – The System of "Proportional Representation of Dual Interests"

a. Introduction

The Japanese Parliament faces the problem that a constitutional revision requires a two-thirds majority in both houses. Under the current party system it is hard to imagine that a compromise can be reached.

However, at least the problems regarding the Upper House could be solved in a different way, namely by amending the Public Offices Election Law. This would be easier due to the requirement of "only" a simple majority. In theory, amending the election law would be easier, but the question still remains whether or not the main parties are open for a change. What cannot be denied is that the current parallel voting system does not serve the purpose of strengthening the bicameral system as it leads to twin houses with no distinctive differences.

Various proposals have been made within the Research Commission on the Constitution to improve the Japanese Diet system. In the following I would like to introduce an alternative approach which will take two important requests into account, namely a stronger reflection of the public will and a distinctive composition of each house due to a difference in backgrounds and interests.

Before going into details, I would like to discuss the question of how to reflect the will of the people in a proper way. Heavily discussed in this context are the benefits of proportional representation on the one hand, and of a majority-vote system based on single constituencies on the other hand.[56] As an example for a supporter of the latter, Kazuyuki Takahashi should be mentioned. In an article published in 1993 – one year before the implementation of the electoral reform of the House of Representatives and still under the unchanged rule of the LDP – he discusses the democratization of Parliament in comparison with the democratization of the Cabinet.[57] He prefers a strong Cabinet and a majority-vote system based on single constituencies to a system of proportional representation and a relatively strong Diet.[58] His arguments are based on the opinion that proportional representation would lead to a multiple party system where coalitions are necessary. This would make political compromises necessary which would not reflect the clear will of the people.

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56 E.g., K. TAKAHASHI, Contemporary Democracy in a Parliamentary System, in: P.R. Luney / K. Takahashi (eds.), Japanese Constitutional Law (Tokyo 1993) 87 *et seq*.

57 For his thoughts on a strong Cabinet and the *kokumin naikaku* system, see, e.g., K. TAKAHASHI, *Kokumin naikaku-sei no rinen to un'yô* [The Idea and Implementation of a People's Cabinet] (Tokyo 1994) 387 *et seq*.

58 Influenced by the French voting system, Hasebe also thinks that "the adoption of a single constituency system should be considered." (Plenary session on Nov. 8, 2001, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, (available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>).

He says that

> "proportional representation is not necessarily the best system for assuring a loyal reflection of the popular will in politics. True, it enables subtle differences in opinion to be represented …. But if the people are expected to express at election time not an ideological or philosophical preference but a choice in favor of a realistic program, we should be aware that the proportional system will often fail to attain this end".[59]

According to Takahashi, by using a majority-vote system – especially based on single constituencies – "politics can be conducted according to the clearly expressed popular will about programs and those who will run them."[60] He says that a single-constituency system like the one used in the elections for the British House of Commons guarantees that the people can choose from clearly defined political programs. It can be assumed that the will of the majority would be reflected in the politics as strong independent parties arise and compromises among the parties would not be necessary. Compromises, according to Takahashi, are not compatible with the will of the people.

It is doubtful whether Takahashi's opinion meets the reality of politics and whether a majority-vote system based on single constituencies is really beneficial to the people. First, it should be said that his point of view is too idealistic regarding the reflection of the public will. It is true that parties use political concepts in their election campaigns. However, it cannot be denied that parties do not stick to their promises a hundred percent when elections are over. It is therefore risky to say that "politics are conducted according to the clearly expressed popular will" and that "ideological preferences should not be expressed in elections." Nobody can absolutely determine every single part of a political concept by voting for a party. In reality, not a fixed political program but rather a political ideology or a political way is chosen. This is one of the key points in a representative democracy. Besides, taking the wish for the best possible political involvement of the people into account, one can say that a single-constituency system leads to a system of choosing between black and white. The political scene would very likely be transformed into a two-party system without a distinct system of checks and balances among the parties or within Parliament. In an extreme case, the – in comparison with systems of proportional representation – high dead vote rate of a single-constituency system[61] can cause the problem of totally neglecting the public will of a

59 TAKAHASHI, *supra* note 56, 96.

60 TAKAHASHI, *supra* note 56, 96.

61 In 1993, in the last election for the House of Representatives under the old electoral system, the total amount of dead votes was approximately 15 million. In 1996, the total number of dead votes in the first election for the House of Representatives exploded to 30 million, twice as much as under the old system. It cannot be denied that this was due to the newly introduced (partly) single-constituency system; see, e.g., M. USAKI, *Kenpô rinen wo ikasu sansei-ken no jûjitsu koso makoto no kadai* [Strengthening the Right to Vote as Expression of the Fundamental Constitutional Concepts Is the Core Issue], in: Zen'ei 721 (2000) 85.

strong minority. This would not be in the interest of a deeper political involvement of the people. Although democracy is characterized by majority decisions, compromises should not be considered negative. On the contrary, compromises guarantee the best possible and broadest support of various groups of interests. Thus, the risk of creating a political scene of controversy can be avoided and a form of consensual dialogue can be established, strengthening the public trust in politics.

One further point which Takahashi mentions in his article is the problem of selecting the prime minister. Irritated by the phenomenon of having various strong political groups ("factions") within the LDP, Takahashi asks for a drastic electoral reform which would lead to a strong single-constituency system. He says that "the current system is not conducive to the clear expression of popular will in the selection of … a prime minister, and … the single-member constituency system and the proportional representation system are better suited to producing a program-based election,"[62] but adds that "proportional representation cannot be adapted easily to the parliamentary system,"[63] and thus gives the preference to the single-constituency system.

It is obvious that the political tug-of-war among the LDP factions has shifted the political decision from public elections to a decision process within the LDP which has put the selection of the prime minister out of reach for the voters. This concern is understandable. A single-constituency system, however, cannot be a solution. People would have to choose a person in an electoral district, not a "political system" or a "political program" as Takahashi believes. This would not mean that the people's influence in the determination of the prime minister would increase. Besides, this would only lead to a stronger personal debate within the parties, as a clear two-party system is most likely to emerge. Political decision-making would still be carried out by the factions. In a well-balanced[64] pure proportional representative system, on the other hand, parties would be forced to present a party program and leave factional "clashes" aside, otherwise the voters could easily choose an alternative by voting for a different party with a better-defined political line. It is an illusion to believe that a single-constituency system could bring positive changes to the problem of neglecting the popular will.

Coming back to the electoral system, I would like to introduce an alternative voting system for both houses respecting the constitutional framework of Art. 42 ("The Diet shall consist of two Houses, namely the House of Representatives and the House of Councilors.") and Art. 43 ("Both Houses shall consist of elected members, representative of all the people.").

62 TAKAHASHI, *supra* note 56, 104.
63 TAKAHASHI, *supra* note 56, 105.
64 See details about the "barring clause" in chapter II.6.b.

b. The Voting System for the House of Representatives

The current electoral system is a mixture of two systems: a strong majority-vote system and a weaker system of proportional representation. In combination, this leads to a unique voting system. Although the electoral system for the House of Representatives is not a bad system, it is clearly beneficial to the bigger parties due to the strong influence of the single constituencies with their majority-vote system. However, in order to accomplish the goal of reflecting the public will in the parliamentary composition, a stronger emphasis on proportional representation should be worth considering. As the members of the Diet should be representatives of the people, the allotment of seats in the Lower House should be proportional to the electoral outcome. Therefore, the elections to the House of Representatives should be based on a system of pure proportional representation. The easiest and fairest way would be to introduce one national voting district in which the voters can choose between nationwide parties. In order to avoid a too large number of parties in the Lower House, a barring clause would be necessary. Three or four percent should be adequate. People would benefit from a wide range of political programs to choose from. Parties would have to keep the interests of the people in mind in order to stay in power. As it is very difficult for a single party to get an absolute majority in an election, the strengthening of coalition governments would be the consequence.

The distinctive characteristic of this system would be the existence of only one nationwide voting district. The parties would publish a list of candidates with an exact ranking of candidates. However, the voters would have the chance to voluntarily submit personal preference votes by adding the name of a certain candidate to the party they choose. If, for example, party A gets 70 seats, the candidates ranked from 1 to 70 on the nationwide party A list will usually each obtain a seat. An exception is the case in which a candidate who would not get a seat according to the party's ranking can collect enough preference votes to climb the ranking and win a seat. A required minimum amount of preference votes would strengthen the official candidate lists to some extent. If, in the above-mentioned example, only less than 70 candidates of the same party can exceed the required minimum of preference votes, the remaining seats will be allotted according to the candidate list. We can say that the parties can set the frame, yet the voters have the last word. By making use of the right to submit preference votes, the people can directly be involved in the composition process of the Lower House.

The size of the current House of Representatives is basically fine. However, it might be helpful to change the total amount of seats to an uneven number in order to avoid a possible stalemate between parties or groups of parties.

The biggest obstacle to a change of the electoral system for the House of Representatives to a system of pure proportional representation is the current political situation itself. The LDP is strongly in favor of a single-constituency system, as this is beneficial to bigger parties. The second major party, the DPJ, does not seem to have a clear

opinion toward either one of the systems. Some politicians within the DPJ prefer a single-constituency system for the same reasons as the LDP. Other DPJ members, however, are reluctant to strengthen the majority voting system and support proportional representative ideas. The current trend toward a two-party system diminishes the chances of introducing a pure proportional representative electoral system drastically. Right now one has to say that the political reality of trying to secure one's own political power by all possible means would rather lead to a stronger majority voting system than to a shift toward a system which expresses the public will in a proportional way.[65]

c. Local Autonomy and Prefectural Assemblies

The idea of local autonomy plays a distinctive role in the voting system of "proportional representation of dual interests." Before talking about its impact on the electoral system for the Upper House, let us first take a quick glance at the principle of local autonomy.

The principle of autonomy of "local public entities" says that the public affairs of local communities are managed independently by those local entities themselves and is guaranteed by the Constitution in its eighth chapter (Local Self-Government). In 1947 the Local Autonomy Law (LAL)[66] was adopted, which is the core law regarding local autonomy. This law, which was originally characterized by a "superior" (centralist government and national Diet)-"subordinate" (local entities) relationship,[67] was amended in 1999 by the Law Concerning the Provisions of Related Laws for the Promotion of Decentralization of Power (Comprehensive Decentralization Law),[68] giving more independent powers to the local entities and leading to a fairer power balance.[69] Although the powers of the local entities were strengthened by the amendment (e.g., abolishment of the former practice of centrally appointed governors), the decentralization process is still not considered sufficient,[70] or at least as something which should be further discussed. Several members ask for a further strengthening of local communities and a decrease of centralist power. In this context, the introduction

65 The resistance of the LDP is obvious. The DPJ, too, cannot be expected to agree to a change, as this party is still growing under the current voting system.

66 *Chihô jichi-hô*, Law No. 67/1947, as amended by Law No. 123/2005; Engl. transl.: <*http://nippon.zaidan.info/seikabutsu/1999/00168/mokuji.htm*>.

67 See, e.g., K. STEINER, Local Government in Japan (Stanford 1965) 300 *et seq*.

68 *Chihô bunken no suishin wo hakaru tame no kankei hôritsu no seibi tô ni kansuru hôritsu (Chihô bunken ikkatsu-hô)*, Law No. 87/1999.

69 For details, see, e.g., S. KISA, Grundlegende Reform des örtlichen Selbstverwaltungsrechts in Japan, in: R. Pitschas / S. Kisa (ed.), Internationalisierung von Staat und Verfassung im Spiegel des deutschen und japanischen Staats- und Verwaltungsrechts (Berlin 2002) 265 *et seq*.

70 E.g., T. TSUJIYAMA, *Jichi kihon jôrei no kôsô* [The Conception of the Fundamental Provisions on Self-Government], in: K. Matsushita / M. Nishio / M. Shindô (eds.), *Jichi-tai no kôsô 4 – kikô* [The Conception of Self-Governing Bodies 4 – Organization] (Tokyo 2002) 6.

of a new regional administrative system (*dôshû-sei*)[71] which would divide Japan into several region-wide administrative units with relatively strong local power is discussed in the Commission, especially in the Subcommittees on Local Autonomy and on the Ideal Government and Organizations.[72]

Currently the biggest – and in this context most important – local entities are the 47 prefectures[73] (*to-dô-fu-ken* system[74]). According to Art. 94 JC, "local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within the law." On the prefectural level, the legislative branch is exercised by the unicameral prefectural assemblies[75] (Arts. 89 *et seq.* LAL) which determine budgets, enact local legislation ("by-laws"[76]), and make decisions on prefectural policies.[77]

The tenure of the prefectural assemblies is four years; the members of the assemblies are elected by direct popular vote based on a majority-vote system. Details about the

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71 For details, see, e.g., <*www.doshusei.com*> *or* <*www.dohshusei.org*>.

72 E.g., Seiken Sugiura (LDP; Chairman of the Subcommittee on the Ideal Government and Organizations): "In order to further improve the local autonomy that is guaranteed as a system in the Constitution, we must go forward with the decentralization reforms that are already under way. The possibility of adopting larger regional units of local government, including the possibility of introducing a *dôshû*-system, should be studied from that viewpoint." (Plenary session on Feb. 27, 2003, available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/20030227f.htm*>) He explained the basic ideas as a "system which would integrate the prefectures into a small number of states or provinces." (Plenary session on Dec. 12, 2002, available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/20021212f.htm*>).

73 The total number of prefectures has remained unchanged since the system was adopted during the Meiji Period. Prefectural areas are based on the local administrative units instituted under ancient statutes during the eighth century, as well as the relationships that existed between the Shogunate government and each area's local clan during the Edo Period. As a result, the areas are well established in the minds of the Japanese people.

74 *To-dô-fu-ken* refers to the Japanese termination in which *ken* generally means prefectures, but in which the terms *to* (for Tokyo prefecture), *dô* (for *Hokkaidô* prefecture), and *fu* (for Kyoto and Osaka prefectures) are also used.

75 *Kengi-kai*

76 By-laws are in some cases also called ordinances.
Art. 14 (1) LAL: "Each ordinary local public body shall have the power to enact a by-law on any subject contemplated in paragraph 2 of Article 2, insofar as not in conflict with [nationwide] law."
Art. 14 (2) LAL: "Each ordinary local public body shall be able to impose duties or restrict rights only by by-law, unless otherwise prescribed by law."

77 Besides the prefectural assemblies we can find municipal assemblies within each prefecture dealing with more local issues. The executive branch implements the policies decided by the legislature. It includes governors (on the prefectural level), mayors (on the municipal level), and their executive committees. Governors and mayors are directly elected by the people. The Japanese local government generally functions on the principle of separation of powers and internal checks and balances to ensure democratic local administration.

voting system for the prefectural assemblies can be found in the Local Autonomy Law (Arts. 17 *et seq.* LAL) and the Public Offices Election Law.[78]

d. The Voting System for the House of Councilors

Although the proposed new Upper House voting system is based on proportional representation as well, it will lead to the consideration of different interests. The new electoral system for the House of Representatives might lead to a predominance of centralist interests. In order to strengthen the local level and take local interests into account, a prefecture-based system should be introduced.[79] Such a system would be the right balance to the quite centralist Lower House voting system. As the Upper House would represent local interests, it can be seen as a link between nationwide politics and the local population. It can be thought of as two such systems, a direct and an indirect, both with certain advantages and disadvantages. In both cases, the voting districts should be identical with the prefectures in order to clearly define the background of the Upper House.

As far as the proposal for a direct system is concerned, the prefectural party branches should create candidate lists. As in the Lower House elections, the voters can choose a party and submit a preference vote for a single candidate from the same party.

In the indirect system, every prefecture should get a fixed number of seats which are allotted to the parties represented in the prefectural assembly in proportion to their strengths. The decisive factor for determining how many seats a prefecture will get should be the total population of the prefecture. The higher the population is, the more seats a prefecture should receive. If, for example, every prefecture gets two basic seats plus one seat for every 500,000 people, the total amount of Upper House seats would be around 325, with a minimum of three seats per prefecture (*Tottori-ken*) and a maximum of 26 (*Tôkyô-to*). The allotment of seats within each prefecture could be based on the d'Hondt method currently used for the 11 nationwide electoral districts in elections for

78 However, in addition to these two laws there is also a by-law called C*hihô kôkyô dantai no gikai no gi'in oyobi chô no senkyo kijitsu-tô no rinji tokurei ni kan suru hôritsu* (Law for Special Exceptions Concerning the Election Day of Elections of Members of Local Autonomous Bodies; Law No. 150/2002). This is closely related to the phenomenon called *tôitsu chihô senkyo* (unified local elections). In order to have many local elections on the same day, the election dates for elections of the local bodies are unified. For the wording of the latest Law for Special Exceptions Concerning the Election Day of Elections of Members of Local Autonomous Bodies, see, e.g., <*http://law.e-gov.go.jp/htmldata/H14/H14HO150.html*>. For further explanations on the unified local election custom, see, e.g., <*http://www.nhk.or.jp/nagano/eve/hatena/030310.html*>.

79 Strengthening the local interests in the Diet has been discussed in the Commission on some occasions – see, e.g., Kinzo Inokawa (informant): "Another possibility for the Upper House is that it could be replaced by a new second chamber composed of representatives of each of the '*dô-shû*'." (First open hearing at the Research Commission on the Constitution on May 12, 2004, available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/20040512f.htm*>).

the House of Representatives. In order to prevent the Upper House from disintegrating into too many parties,[80] a nationwide barring clause should be introduced. This barring clause can be as low as one percent because its main purpose is to avoid single prefectural parties. However, parties which run only for a single prefectural election or in few prefectural elections should have the chance to cooperate with parties in other prefectures, running for the Upper House elections as a parliamentary joint group. The indirect elections should take place separately for each prefecture whenever a prefectural assembly election is held. This has the advantage that the composition of the Upper House is able to reflect the most current political will of the people.

The current electoral system for the prefectural assemblies[81] would interfere with the system of indirect proportional representation because the majority-vote system used for the prefectural elections distorts the electoral proportions expressed by the people. Therefore, if the indirect system were used, the electoral system for the prefectural assemblies should be changed into a proportional system, too. This can be seen as a disadvantage of the indirect system. Using the above-mentioned direct system, the voting system for the local elections for the prefectural assemblies could be left unchanged. However, this could lead to a proportional discrepancy between the composition of the House of Councilors and the composition of the various prefectural assemblies, both being an expression of local interests. Depending on whether one prefers a thorough reform or not, the indirect or the direct system should be introduced. Both have the positive effect of integrating local interests to a larger extent into the centralist law-making process.[82]

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80 In most of the prefectures one can find small parties which run only for single prefectural elections and thus only have seats in one single prefectural government.

81 See chapter II.6.c.

82 In both cases, in the direct system as well as in the indirect system, questions might occur with regard to Art. 43 JC which says that "both Houses shall consist of elected members, representative of all the people." Some understand the term "representative of all the people" in a way which is incompatible with the introduced prefectural representative system; see, e.g., HASEBE, *supra* note 44, 347. It is argued that the intention of Art. 43 does not allow for representing the interests of only a local entity. According to this view, members of both houses have to represent the interests of all people throughout the nation. This opinion is more than doubtful. "Representing all the people" does not mean that every single member of the Parliament has to represent every single citizen or the nation as a whole. It is rather required that the parliamentary members in total are representatives of "all the people" and that no citizen should be excluded from being represented. One should be careful not to mix the introduced system with a system used, for example, in the House of Peers under the Meiji Constitution. The difference is that in the prefectural system, all people are represented, whereas in a House of Peers only some classes – or if one takes a house made up by experts, only some professions – are represented. As all prefectures – and through the prefectures all citizens and thus the whole nation – would be represented in the Upper House according to the voting system of "proportional representation of dual interests," Art. 43

III. CLOSING REMARKS

On January 20, 2005, the Research Commission on the Constitution celebrated the five-year anniversary of its inauguration. Three months later, on April 15, 2005, the Commission presented its Five-Year Report.[83] Although the initial plan was to complete the research after a period of five years and present a final report, the term "final" was avoided. One might ask why this way was chosen and what will happen to the Commission in the future, especially if one takes into account that the schedule for upcoming events is kept blank on the homepage of the Research Commission on the Constitution. Officially, the Commission has not ended its research work yet. Although it seems that the deliberations have come to an end, it is not clear whether or not the purpose of the Commission will be changed into a preparatory function regarding a possible constitutional reform, something which is supported by the "reformists." Only the JCP and the SDP totally oppose plans for constitutional revision.

Anyway, seeing the opposite interests and arguments of the political parties, it is doubtful that a revisionist compromise can be made in the near future. In other words, a ("final") report can be more or less easily written even if no agreement on the central issues can be made. A constitutional revision, on the other hand, is much more difficult

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would not be infringed. The sovereignty of the people and the nation would not be offended. Ôishi, for example, says: "… for the House of Councilors perhaps a system of three representatives from each of the prefectures [should be considered]." (Subcommittee on the Fundamental and Organizational Role of Politics on Apr. 11, 2002, published in: Interim Report of the Research Commission on the Constitution, The House of Representatives, available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/interimreport.htm*>). The "meeting of experts to think about the future of the Upper House" (*Sangi-in no shôrai-zô wo kangaeru yûshiki-sha kondan-kai*) asks for the strengthening of local interests by changing the Upper House into a house made up of prefectural representatives; see SANGI-IN KENPÔ CHÔSA-KAI JIMU-KYOKU [Office of the Upper House Research Commission on the Constitution], *Kenpô-ten to kenpô fuzoku-hô ni kansuru shuyô-koku no seido* [The Systems of Major Countries Regarding the Constitution and Related Laws] in: Sanken shiryô 25 (2004) 21. The Supreme Court, too, does not question the constitutionality of prefectural members"; e.g., Supreme Court in a concurring opinion on Jan. 14, 2004 (Minshû 58, 1; Engl. transl.: <*http://courtdomino2.courts.go.jp/promjudg.nsf/766e4f1d46701bec49256b8700435d2e/cf9b069ecbe5198849256ed30023c06c?OpenDocument*>):
"… The mechanism of the House of Councilors election system was designed to divide the House of Councilors members into nationally elected members … and locally elected members …, and to provide the latter members with the significance or function of collectively reflecting the intentions of the residents of each prefecture, in light of the fact that a prefecture can be defined as a unit with historical, political, economic, and social significance and substance as well as being a political entity. … The mechanism of the House of Councilors election system set forth in the Public Offices Election Law cannot be said to be unreasonable as a method of representing the interests and opinions of people or groups of people fairly and effectively in the Diet …".

83 The Five-Year Report (*Shûgi-in kenpô chôsa-kai hôkoku-sho*) can be found at <*http://www.shugiin.go.jp/itdb_kenpou.nsf/html/kenpou/houkoku.htm*>. Currently, there is only a Japanese version.

to be carried out as a two-thirds majority in both houses would be necessary (Art. 96 [1] JC). This means that – in the current Diet – the two leading parties, the LDP and the DPJ, would have to agree on a constitutional revision. Without the support of both of them, a two-thirds majority is not possible. Taking their partly opposite views into account, it is hard to imagine that they will come to a positive agreement.

Art. 96 (1) JC is the final but not the only obstacle to constitutional revision. Questions can be raised about the necessity of a revision. Some argue that the Japanese Constitution is too vague[84] in its wording or that it has too few provisions. It cannot be denied that the wording of the Constitution is in some cases too idealistic, too vague. But this should not be seen as having only negative effects. It is obvious that no constitution – however clear the wording might be – can comprise all possible scenarios. This is truly impossible. A constitution whose wording leaves quite some room for interpretation has the advantage that numerous cases can be subsumed under its provisions. It is the job of the courts to interpret the law and make decisions. Of course, as an objection to a vague constitution it can be argued that a more clearly expressed constitution would have the advantage of having legal certainty and thus could lead to a better predictability of legal decisions. The central question is to what extent a constitution, which has strict requirements for an amendment, should contain clear yet inflexible provisions.[85] This cannot be answered in this paper. However, it will be of significant importance for the future of the Japanese Constitution. The only thing that I would like to emphasize in this context is that in my opinion it is more practicable not to regulate too many matters in a constitution, but instead by the means of laws of non-constitutional rank, as by doing so it is easier to react to changed situations. A constitution should contain the fundamental provisions regarding the law, the legal system, legal principles, and human rights, in order to offer a strong reliable basis. Matters which are closely related to easily changing conditions, however, should be regulated more flexibly.

The election law is a good example of a legal area which is important yet should be flexible. The Japanese Public Offices Election Law should and can be amended by a simple majority in order to restore the characteristics of a bicameral parliament, two houses different in their composition based on distinctive interests. Using the voting system of "proportional representation of dual interests" could lead to the realization of this goal. The people could be better included in the political process; centralist ideas as well as local interests could both be strengthened. This could lead to a win-win situation for both houses instead of retaining a contradictory bicameral system.

Coming back to the issue of a possible constitutional revision, I would like to emphasize the importance of Art. 9. If the Japanese Constitution is to be revised after the

84 The vagueness of its provisions is a typical characteristic of the Japanese Constitution.

85 The supporters of a clear wording will naturally support the revisionist movement. Those who are in favor of interpreting the Constitution widely will rather oppose plans of revision.

completion of the research work, Art. 9 will play a central part. One can say that the "renunciation of war" clause is a provision which would surely be affected by a revision by including the Self-Defense Forces and expressing clearly the will to take part in international peace-keeping operations. On the other hand, unless an agreement can be made with regard to Art. 9, the Constitution will not be amended. The Art. 9 issue is too important to be left aside in the event of a constitutional revision. Especially the LDP will not give up the demand for a change in the wording according to their basic point of view – if general agreement on a revision of other constitutional provisions is reached, such as the introduction of new constitutional rights. Art. 9 is the steering constitutional provision in the revision process.

One further question which arises in the context of a possible constitutional revision and Art. 96 (1) JC[86] is the question of who has the right to propose a revision.[87] The legal procedure with regard to a constitutional amendment is not explicitly regulated by law. The majority holds the opinion that the general provisions should be used,[88] which would mean that the Cabinet as well as the Diet has the right to propose an amendment to the Constitution.[89] Others believe that only the Diet should be allowed to propose a revision based on the wording of Art. 96 (1) JC.[90]

86 "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."

87 R. NEUMANN, Änderung und Wandlung der japanischen Verfassung (Köln 1982) 6 *et seq*.

88 For details about the legislative process, see, e.g., M. NAKAMURA / T. TSUNEMOTO, The Legislative Process: Outline and Actors, in: Y. Higuchi (ed.), Five Decades of Constitutionalism in Japanese Society (Tokyo 2001) 195 *et seq*.

89 E.g., Kiichi Inoue *(*NCP): "I think both the Diet and the Cabinet should have the right to initiate amendments to the Constitution." (Subcommittee on Ideal Government and Organizations on July 10, 2003, available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/20030710gof.htm*>).

90 E.g., Motohisa Furukawa (DPJ): "I believe that only the Diet has the right to propose revisions to the Constitution." (Subcommittee on Ideal Government and Organizations on July 10, 2003, available at: <*http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/20030710gof.htm*>).

ZUSAMMENFASSUNG

Die japanische Verfassung ist eine der stabilsten Verfassungen der Welt. Seit ihrem Inkrafttreten im Jahre 1947 wurde sie kein einziges Mal geändert. Im Laufe der Jahrzehnte gab es zwar immer wieder Diskussionen über eine mögliche Revision, die aber allesamt im Keim erstickt wurden.

Erst im Jahre 1997, mithin 50 Jahre nach dem Inkrafttreten der Verfassung, fand ein Umschwung statt, als eine Allianz aus Koalitions- und Oppositionsparteien, mit Ausnahme der SDP und der JCP, Gespräche bezüglich der Einsetzung einer Verfassungsuntersuchungskommission aufnahm. Zwei Jahre später kam es zu einer Einigung. Im Januar 2000 wurde die Kenpô Chôsa-kai *(Verfassungsuntersuchungskommission) aus der Taufe gehoben. Ihr Zweck war bzw. ist immer noch, die „japanische Verfassung umfassend zu untersuchen". Alle Parlamentsparteien inklusive der absoluten Revisionsgegner SDP und JCP nahmen an den Arbeiten der Verfassungsuntersuchungskommission teil. In der Literatur ist die Kriegsverzichtsklausel des Art. 9 häufig diskutiert worden. Jedoch ist dies nicht das einzige Thema, mit dem sich die Kommission befaßt. Sie untersucht, aufgeteilt in verschiedene Untergruppen, die gesamte Verfassung. Im westlichen Schrifttum wurde die Diskussion rund um das japanische Oberhaus bisher nicht näher aufgegriffen. Die Reformen der letzten Jahre machten dieses aber zu einem interessanten Untersuchungsgegenstand, da sich die beiden Häuser in ihrer Zusammensetzung sehr gleichen. Verschiedene Aspekte wie etwa die Notwendigkeit eines bikameralen Systems, die Verteilung der Kompetenzen oder die Zusammensetzung des Oberhauses wurden bisher ausführlich von der Kommission diskutiert. Der vorliegende Artikel beginnt mit einer allgemeinen Darstellung der Arbeit der Verfassungskommission und beschäftigt sich daran anschließend mit der Diskussion rund um das Oberhaus. Abschließend wird versucht, eine Alternativlösung aufzuzeigen.*

Seit Beginn der Kommissionsarbeit sind mehr als fünf Jahre verstrichen. Obwohl man nach diesem Zeitpunkt einen Schlußbericht veröffentlichen wollte, kam es bisher nur zur Veröffentlichung eines „Fünf-Jahres-Berichts". Die Zukunft der Kommission ist ungewiß. Wenn es nach dem Willen der Koalition geht, werden ihre Kompetenzen in Richtung Erarbeitung eines Verfassungsvorschlages ausgedehnt werden. Falls dies nicht der Fall ist, wird die umfassende Arbeit der Kommission zumindest kurzfristig keinen weiteren Einfluß auf die Verfassung haben.