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# MAJOR LEGISLATION & TREATIES

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## 1. Constitutional Law

### **The Law Concerning Procedures for Amendments of the Constitution of Japan**

Law No. 51, May 18, 2007 (Effective on May 18, 2010). 151 clauses and 12 supplementary ones.

#### **Background:**

In recent years, the political circumstances in Japan have greatly changed. The conservatives have realized their long-cherished desires, which were considered taboo for a long time. ‘Conservatives’ in Japan does not mean the political forces seeking to maintain the status quo but rather those who wish to recover something patriotic which people sometimes feel to be nationalistic. Former Prime Minister Junichiro Koizumi won a historic victory in the general election in 2005 and the government parties gained more than two-thirds of the seats in the House of Representatives. Shinzo Abe, who was the first prime minister from the post-war generation to inherit a strong power base in the Diet, undertook a number of large tasks which had been on the conservative agenda for a

long time: revision of the symbolic laws of the liberal democracy after the end of the war. The general goal of his administration was to “get rid of the post-war regime”. In 2006, the Fundamental Law of Education was revised at last. The pre-revision Law as well as the Constitution were post war symbols of Japan as a liberal-democratic state, arising from the deep regret for the stupidity of the war. They also guarded against unreasonable infringements of the freedom of thought and conscience of the people. Therefore revision meant a great change in Japanese political circumstances. Naturally, the next target is the amendment of the Constitution itself, which means not simply individual amendments to active provisions, but the total revision of the Constitution. In 2007, the Law Concerning Procedures for Amendments of the Constitution of Japan got through each House. The conservative forces are preparing for the next step to satisfy their long-standing desire. Mr. Abe suddenly resigned as Prime Minister, and Yasuo Fukuda, who is seen as more liberal in several ways, succeeded to the Cabinet and is taking a middle course at present. The legacies of the Abe administration are the revised Fundamental Law of Education and the Law Concerning the Procedures for Amendments to the Constitution of Japan.

The Constitution of Japan has provisions concerning amendments, but they do not give particulars of the procedures, and they mandate the Diet to specify a special referendum for amendments. Article 96(1) of the Constitution provides that “[a]mendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of the members of each House and shall thereupon be submitted to the people for a referendum or at such an election as the Diet shall specify.” It means that any amendments to the Constitution need both a proposition by the Diet and approval by the people. The Law Concerning Procedures for Amendments of the Constitution of Japan provides for both procedures in detail.

The preliminary history is as follows. In 1997, which was the 50<sup>th</sup> year after the enforcement of the Constitution, suprapartisan members of the parliament suggested that a special meeting for discussion of the Constitution be established in the Diet. This movement led to the setting up of the Research Commissions on the Constitution in both Houses in 2000. Afterward, the parties made and published a bill for constitutional

amendments. The Social Democratic Party and the Japanese Communist Party expressly opposed the revision of the Constitution and the establishment of the Research Commissions in the Diet. However, the Commissions started discussions in 2000. Over the next five years, the Commissions researched various constitutional problems, including the necessity to amend the current Constitution. On April 15, 2005, the Research Commission on the Constitution in the House of Representatives submitted its final report to the Speaker and suggested that the law providing the procedures for amendments of the Constitution should be enacted quickly. At that time, the government parties and the Democratic Party of Japan had published the bills concerning procedures for amendments of the Constitution.

The discussion moved to the next stage. On September 22, 2005, the Special Committee on the Constitution was established in the House of Representatives and started discussions. Its main task was to research the procedures for amendments in foreign countries, especially referendums by the people. On May 26, the government parties and the Democratic Party of Japan submitted each bill concerning the procedures for the constitutional amendments. On June 1, after the substance of the bills was explained at the plenary session in the House of Representatives, questions and answers were held. The same committee was established in the House of Councilors later on.

In the new year, the government party and the Democratic Party of Japan submitted their modified bills and the modified bill of the government parties was adopted at the Special Committee on the Constitution in the House of Representatives and on the next day, the bill passed through the plenary session in the House of Representatives and was sent to the House of Councilors. The bill was adopted with a supplementary resolution at the Special Committee on the Constitution in the House of Councilors on May 11 and passed through the plenary session in the House of Councilors on May 14. The supplementary resolution delivered many things to be considered in enforcing the law, especially suggesting the need to discuss how to administer referendums by the people. Thus, the Law Concerning Procedures for Amendments of the Constitution of Japan (Law No. 51) was approved on May 18, 2007 and will be completely effective on May 18, 2010. Some parts of the law are already effective, and

revise the Diet Law and establish the Deliberative Council on the Constitution in both Houses. The Councils inherited the basic framework of the previous Research Commissions on the Constitution, but in addition, they are empowered to research any proposed amendments to the Constitution. Remarkably, the standing organization, the Deliberative Council on the Constitution, has the power to propose amendments.

### **Main Provisions:**

Article 96(1) of the Constitution provides that “[a]mendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of the members of each House and shall thereupon be submitted to the people for referendums or at such elections as the Diet shall specify.” Therefore, both an initiative by the Diet and approval by referendum are necessary in order to amend the Constitution. The Law has 151 clauses and 12 supplementary ones and provides these procedures in relatively detail. The basic framework of the law is divided into two parts. One is related to the Diet’s initiative to amend the Constitution. Another is the procedures for a referendum by the people. In addition, the Law provides the action in which the people complain about the validity of the referendum.

#### **(1) The initiative of the Diet**

Chapter 6 of the Law rewrites the Diet Law to add the procedures for the initiative, especially allowing the Diet to propose an original bill of amendments to the Constitution. The substance is as follows. More than 100 Representatives or 50 Councilors can propose an original bill. Each Deliberative Council can submit it as well. Remarkably, the Law does not mention the powers of the Cabinet. The Constitution empowers the Cabinet to submit bills to the Diet. But its power is to propose original plans for statutes, not the proposal to amend the Constitution. Therefore, at least on its face, the Law does not give the Cabinet power to submit any original bill. In proposing an original bill, the members of parliament should distinguish amendments according to their subject matter. For example, they should propose a bill in distinction between an amendment to create the environmental rights and an amendment to Article 9 which prohibits holding military power. After approving a bill, the Diet initiates it to the people. The Constitution says a referendum by the people follows

the initiative of the Diet. The above revisions are provided in Article 151 of the Law. Notably, the power of the Deliberative Council on the Constitution to submit an original bill for amendment is suspended for three years, because, for the time being, the Diet should focus on the problems which the final report of the Research Commission on the Constitution suggested.

(2) The procedures for a referendum by the people

Articles 1 to 150 provide procedures for a referendum by the people in detail. The essence of those are as follows. According to article 2 section 1, a referendum has to be held after 60 days and within 180 days from the Diet's initiative. Article 3 provides that people who are 18 years or older have a voting right. Because most other laws provide that people attain their majority at 20, this provision has incompatibility with others. For example, the franchise is not given to persons until they are 20 years old. The Diet is seriously considering revising other laws so that people reach the age of majority at 18. Until the Public Offices Election Act is rewritten to extend the franchise to all people who are 18 years or older, as a temporary measure, voters are limited to 20 years or older (supplementary clause 3, section 2). Whether the law which denies people living in foreign countries franchises in general elections is unconstitutional has been disputed in courts. Under this law, however, the electorate who live in foreign countries can vote (article 33).

After the initiative of the Diet, a conference for publicity has to be established in the Diet to explain the proposed amendments (article 11). The conference consists of 20 members from each House (article 12, section 2). Its main task is to sum up the main points of the proposed amendments, to make lists in contrast with active provisions, and to make sure both affirmative and negative options on amendments (article 14).

The proposed amendments will not be discussed in the Diet, but by the people themselves. The Law has provisions about any actions inviting to vote for or against the proposed amendments, which is called as an action for a referendum. They restrain the way to act for a referendum in order to clear discussion of any undue influence, so that discussion would be more free and open-minded. Of course, the Law is designed not to violate the constitutional right to free speech, but to remove chilling effects on discussions. Article 100 provides that any application of those articles

requires vigilance against unjustifiable violations of constitutional rights, such as freedom of speech, freedom of academic activity, and freedom of political activity. With such a saving clause, the law prohibits actions for the referendum by government officials engaging in services concerning the referendum during their incumbency (article 101 & 102) on by taking advantage of positions as teachers or officials (article 103). Broadcasting companies also have an obligation to preserve political fairness, which the Broadcasting Law requires as well (article 104).

In the referendum, if the votes agreeing with the amendment are more than one half of all votes, the amendment is approved (article 126, section 1).

Finally, the law provides procedures for a law suit in which people can argue against the validity of the referendum. Those who want to unvalidate a referendum can file a law suit with the Tokyo High Court within 30 days (article 127). Courts can declare a referendum to be null only under limited cases enumerated in article 128.

#### **Editorial Note:**

As already mentioned, the political circumstances in Japan have greatly changed. The conservatives have realized their long-standing desires. Especially, the Abe administration, whose goal was to get rid of the post-war regime, left us an unfavorable legacy. It is the Law Concerning Procedures for Amendments of the Constitution of Japan. It is said that the procedural act for constitutional amendment is an indispensable one. Its lack is thought to be disadvantageous rather. Nevertheless, most of the constitutional professors in Japan opposed even enacting a procedural act for constitutional amendment. The main reason was that they feared the following amendments themselves. Especially, any amendment to Article 9 on the Constitution means a great switch in the national security policy of Japan. Consistently, the Japanese government proclaims that the country has only an exclusively defensive security system. The Self-Defense Forces are constitutional simply because they do not have enough power to perform warfare against other countries. In addition, the draft which the Liberal Democratic Party of Japan made public on November 22, 2006, is highly problematic for liberals. Even if the procedural act was appropriate, the presumptive proposition would not be favor-

able for many people. That is why many people who fear extreme right-wing propositions to amend the Constitution hesitate to agree with the enactment of the law.

I think that the law has some problems. First of all, it provides that a referendum by the people shall be held within 180 days after an initiative by the Diet. Are three months enough time for people to consider the proposed amendments and to decide whether to vote for or against? If we discussed whether an amendment to the fundamental law of the state was appropriate, it would take much more time to reach a conclusion. Especially, because any amendment shall propose every rewriting provision, people will have to consider several constitutional matters at once. We should evaluate all propositions deliberatively so as to consider everything about the constitutional law. I think the 180 days clause should be reconsidered to prolong the length of time to consider an amendment, at least to more than a year.

Secondly, the law provides that amendments shall be approved by referendum when it gets one half of the votes of all votes which are actually given in an effectual way (article 126, section 1). This provision causes a constitutional problem. Article 96, Section 1 provides that approval needs more than 1/2 of the votes in a referendum. What exactly does “1/2 of the votes” mean? Is it 1/2 of all votes which are actually cast in an effectual way? Or is it 1/2 of all the people? The dominant view in the constitutional scholarship is that the Constitution requires more than 1/2 of the votes which are actually cast in an effectual way. But its grounds are not clear. I think it is possible to think that the Constitution requires 1/2 of the votes of all the electorate. If taken as the requisite for an amendment strictly, I think the hurdle should be much higher.

Anyway, we face the constitutional crisis for the first time under the current Constitution. The presumptive conception of the amendment is an extremely right-wing one. A constitution is made for people who have fundamentally different views, not for the integration into a nation. It enables people to cooperate in a society, to enjoy benefits and share their costs, while being tolerant to each other. It is a genuine social contract. Now, it is time to take the constitution seriously. It is we the Japanese that are the final fortress for the Constitution exemplifying Japan as a liberal and democratic state.