

**NATIONAL REFERENDUM AND POPULAR SOVEREIGNTY
IN JAPAN**

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INTRODUCTION

This Article analyzes the concept of “national referendum” and the relationship between representatives and citizens in Japan. In Japan, there is no provision for a referendum on a national level except by a constitutional amendment and a special statute in national parliament, which applies only at the local public entity level. Unlike at the national level, the Japanese Constitution allows local governments to have a referendum and recall system. For example, in Okinawa Prefecture, where a United States’ (U.S.) base is located, the local government held a referendum that asked whether voters wanted the U.S. base to stay or relocate. This referendum constituted a review of the Japan-U.S. Status of Forces Agreement.

As Japanese constitutional studies have explained, a national referendum on specific issues is permissible only if it does not possess binding power. First, the Japanese Constitution declares that only parliament, known as the Diet, possesses law-making power. Thus, representatives may abuse the outcome of a national referendum by claiming they are acting in the name of the people through plebiscite. Additionally, the Japanese Constitution does not contain a provision that permits a recall system to discharge parliamentary representatives. Such representatives work for all Japanese people and do not depend on voters in their electoral districts.

The Japanese Constitution is founded on the notion of popular sovereignty. Popular sovereignty is a concept derived from the French Constitutions of 1791 and 1793. The French Constitution of 1791 established popular sovereignty, which is the principle that political power lies with the people and government derives its authority from the people’s consent through their elected representatives.

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Significantly, the French Constitution of 1793 emphasized the power of the voters in a government founded on popular sovereignty. Guided by this historical principle, once representatives are chosen, they work for all of the people, independent of the will of their electoral district.

If a national referendum is allowed, the Japanese people may question the continued existence of popular sovereignty, wherein, the people, decide their destiny and take responsibility for their choices. In reality, however, ordinary people do not consider politics an integral part of their daily lives. Nowadays, a strong ruling party makes the important decisions without deliberation. In Japan, democracy is in crisis. Theoretically, the Japanese Constitution is set up so that parliament reflects the will of the people. Japanese constitutional scholars have proposed semi representative and sociological representative systems to connect politics with citizens. Both forms of representation overlap and should aim to reflect the will of the people to the parliament. Under the semi representative system, the representatives' will should match that of the people. Under the sociological representative system, the representatives are legitimized through elections and the people should be empowered to choose a political party that reflects their beliefs through partisan distribution in the parliament.

In the 1970s, scholar Yasuo Sugihara analyzed the notion of "people" under popular sovereignty and addressed the gap between the will of the people and that of their representatives. He argued that the concept of sovereignty may work as a political ideology under popular sovereignty in the Japanese Constitution. Sugihara's analysis has helped ordinary people realize that they hold political power and that politics should be an integral part of their daily lives. As a prominent French constitutional scholar in Japan, Professor Yōichi Higuchi, however, continues to doubt the reality of direct democracy.

I. NATIONAL REFERENDUMS UNDER THE JAPANESE CONSTITUTION

This Article reviews the possibility and theory of the national referendum under the Japanese Constitution. Under globalization, the internationalization of nations restricts the sovereign state's discretionary power: the government's ability to make decisions for

itself.¹ Similarly, the narrowed scope of national authority limits what “we the people” can decide today. We can no longer make decisions for our future like we used to. Under the Japanese Constitution, sovereignty resides with the power and authority of the people.² Authority refers to democratic legitimacy and power derives from the voters who choose their representatives in parliament, the National Diet.³ The Emperor has no power or authority; his power is limited to a ceremonial and symbolic role.⁴

*A. Limited Sovereignty and the Representatives’ Relationship with
“We the People”*

Article 43 of the Japanese Constitution states that the representatives are expected to work for all of the people.⁵ This means that representatives should be independent from the will of the voters in electoral districts. Once electoral districts vote on their representatives, those representatives become members of parliament and should reflect the integrated will of all of the people.⁶ The Japanese Constitution’s Preamble indicates that it implements indirect democracy but with a few provisions for a direct voting system, namely

1. See NOBUYOSHI ASHIBE, *KENPŌ [CONSTITUTION]* 39-43 (6th ed. 2015) (Japan). This book is one of the most famous books on the Japanese constitution. Nobuyoshi Ashibe, a professor at The University of Tokyo, is specialized in American constitutional law. See *Lawyer Group Charges Abe with Constitutional Ignorance*, JAPAN TIMES (Feb. 14, 2014), <https://www.japantimes.co.jp/news/2014/02/14/national/lawyer-group-charges-abe-with-constitutional-ignorance/#.XlsZxy2ZM0p>. See also TOSHIHIKO NONAKA ET AL., *KENPŌ I [CONSTITUTION I]* 90-94 (Yuhikaku 2012) (Japan) [hereinafter NONAKA ET AL., *KENPŌ I*]; HIDEKI MOTO ET AL., *KENPŌ KŌGI [LECTURE OF CONSTITUTION]* (Nihon Hyoronsha 2018) [hereinafter MOTO, *KENPŌ*].

2. *NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION]*, pmb. (Japan); ASHIBE, *supra* note 1, at 41. See SHIGENORI MATSUI, *THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS* 38-41 (2011).

3. *NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION]*, pmb., art. 43 (Japan). See ASHIBE, *supra* note 1, at 39; MATSUI, *supra* note 2, at 38-41.

4. *NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION]*, art. 1 (Japan).

5. *Id.* art. 43 (Japan); TOSHIHIKO NONAKA ET AL., *KENPŌ II [CONSTITUTION II]* 59-64 (Yuhikaku 2012) (Japan) [hereinafter NONAKA ET AL., *KENPŌ II*].

6. *NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION]*, art. 43 (Japan).

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a constitutional amendment,⁷ “[a] special law, applicable only to one local public entity,”⁸ and a judge’s referendum.⁹

The current Constitution was promulgated in November 1946 and has never been amended.¹⁰ The Constitution of the Japanese Empire (Meiji Constitution) was replaced with the current Japanese Constitution, which transferred power from the emperor to the people.¹¹ To understand this change in the view of sovereignty, consider an American constitutional law scholar Professor Nobuyoshi Ashibe’s explanation that constituent power lies outside of the Constitution and differs from the power to amend the Constitution.¹² The power to amend the Constitution is an institutionalized constituent power.¹³ Professor Ashibe argues it is impossible to amend the Constitution’s designation of sovereignty and its provisions on human rights and peace.¹⁴ Under the current Constitution, Japanese people reserve the power to make constitutional amendments, but they have never

7. *See id.* pmbi., art. 96. “Amendments to this Constitution shall be initiated by the Diet, . . . and shall thereupon be submitted to the people for ratification, . . . at a special referendum or at such election as the Diet shall specify.” *Id.* art. 96.

8. *Id.* art. 95 (“A special law, applicable only to one local public entity, cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law.”).

9. *Id.* art. 79(2) (“The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.”).

10. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan); Adam P. Liff & Ko Maeda, *Why Shinzo Abe Faces an Uphill Battle to Revise Japan’s Constitution*, BROOKINGS: ORDER FROM CHAOS (Dec. 15, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/12/15/why-shinzo-abe-faces-an-uphill-battle-to-revise-japans-constitution/>.

11. *Compare* DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 1 (Japan), *with* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 1 (Japan).

12. ASHIBE, *supra* note 1, at 42-43, 396-98 (Ashibe explains that the power to amend the Constitution originates from constituents’ power. The power to amend the Constitution cannot be used to take away the people’s sovereignty or their fundamental human rights). *See* MATSUI, *supra* note 2, at 38-41.

13. ASHIBE, *supra* note 1, at 42.

14. *Id.* at 396; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 9, 10-40 (Japan) (Article 9 is the peace clause and Articles 10-40 are the provisions about the people’s human rights.).

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exercised that power. The National Diet consists of two houses: the House of Representatives and the House of Councillors.¹⁵ Ordinarily, politics is left in the hands of the representatives in both houses.

To understand Japanese sovereignty and the relationship between the people and the representatives, it is necessary to consider how Japanese constitutional studies reflect French constitutional studies. Ashibe explains that in the Japanese Constitution, the term authority refers to national sovereignty established by the French Constitution of 1791, whereas the term power refers to people sovereignty established by the French Constitution of 1793.¹⁶ Ashibe's discussion focuses on Yasuo Sugihara and Yōichi Higuchi's views on sovereignty. Sugihara's work examines Raymond Carré de Malberg's theory, which positioned the Constitutions of 1791 and 1793 as rivals.¹⁷ On the other hand, Higuchi examines Georges Burdeau's and other French constitutional scholars' work.¹⁸

Japanese constitutional studies have been influenced by U.S., French, and German constitutional studies. Professor Yōichi Higuchi argues that the people originally had the constituent power to establish the current Constitution when it was instituted.¹⁹ Once the provisions were fixed into the constitution, the constituent power froze, and it reactivates only on a few rare occasions, such as when the people make an amendment.²⁰ French constitutional scholars in Japan argue that the

15. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 42 (Japan).

16. ASHIBE, *supra* note 1, at 40-43; Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT'L J. OF CONST. L. 224, 228, 230.

17. *See* Hasebe, *supra* note 16, at 226-27, 227 n.4. *See generally* Olga Bashinka, *Raymond Carré de Malberg and the Interpretation of Sovereignty in the Belgian Constitution*, 35 J. OF CONST. HISTORY 149 (2018) (discussing Carré de Malberg's theory on sovereignty and views on referendums).

18. MIYOKO TSUJIMURA, *FRANSU KENPŌ TO GENDAI RIKKENSUGI NO CHŌSEN [THE FRENCH CONSTITUTION AND THE CHALLENGE OF MODERN CONSTITUTIONALISM]* 163-67 (2010) (addressing Higuchi and Sugihara's views and noting that their views are less conflicting than they appear).

19. YŌICHI HIGUCHI, *KINDAI RIKKENSUGI TO GENDAI KOKKA [MODERN CONSTITUTIONALISM AND NATION]* 302 (Keiso Shobo 1973) [hereinafter HIGUCHI, *KINDAI RIKKENSUGI*].

20. *Id.* at 302-04; *see also* YASUO SUGIHARA, *KOKUMIN-SHUKEN TO KOKUMIN-DAIHYO-SEI [THE NATIONAL SOVEREIGNTY PRINCIPLE AND REPRESENTATIVE REGIMES]* 319-326 (Yuhikaku 1983) [hereinafter SUGIHARA, *KOKUMIN-SHUKEN*]

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dichotomy of Professor Raymond Carre´ de Malberg is too simplistic, but they admit that de Malberg’s distinction has helped understand how the Japanese Constitution first reflected the French Constitution of 1791 and then of 1793.²¹ For example, one of the leading French constitutional scholars in Japan, Miyoko Tsujimira, explains that the battle between Higuchi and Sugihara in the 1970s epitomizes academic research on sovereignty.²²

Japanese constitutional studies reveal that the Japanese Constitution considers authority to be more important than power, but the representatives shall reflect the people’s diverse perspectives.²³ The idea of having both semi representatives²⁴ and sociological representatives²⁵ has been developed to connect people with politics. The role of semi representatives is to convey the will of the voters to the people’s representatives in parliament.²⁶ Sociological representatives, however, are selected by voters through partisan elections.²⁷ Japanese constitutional studies are now studying how to practice democracy by utilizing semi and sociological representatives. However, Japanese constitutional studies face certain issues: how to assure that the people’s *voice* reaches parliament, particularly when that voice is difficult to define and assess, and how to allocate the parliamentary seats to adequately reflect the people’s vote.²⁸

(summarizing Higuchi’s argument and explaining Sugihara’s disagreements); MATSUI, *supra* note 2, at 39.

21. ASHIBE, *supra* note 1, at 43 (discussing the contrast between the French Constitution of 1791 and of 1793).

22. See TSUJIMURA, *supra* note 18, at 163-170.

23. NONAKA ET AL., KENPŌ I, *supra* note 1, at 36-41.

24. NONAKA ET AL., KENPŌ II, *supra* note 5, at 59-63; see also YŌICHI HIGUCHI, HIKAKU KENPŌ [COMPARATIVE CONSTITUTION] 475 (1992) (Japan) (explaining that Adh mar Esmein defines semi representative as requiring parliament to reflect the people’s will); YASUO SUGIHARA, KENPŌ I [CONSTITUTION I] 147-50 (Yuhikaku 1987) (Japan) [hereinafter SUGIHARA, KENPŌ I].

25. NONAKA ET AL., KENPŌ II, *supra* note 5, at 60-61.

26. HIGUCHI, HIKAKU KENPŌ, *supra* note 24, at 474-75.

27. MOTO, KENPŌ, *supra* note 1, at 68, 153-54.

28. HIGUCHI, HIKAKU KENPŌ, *supra* note 24, at 475.

B. How to Understand Sovereignty in Japan

Sovereignty changed from the Emperor to “we the people” under the current Constitution. Additional research is needed to explain how a constitutional amendment could change the nature of sovereignty. Nonetheless, a review of renowned academic discussions regarding sovereignty in Japanese constitutional studies illustrates how Japanese scholars have incorporated the French constitution into the Japanese model.

Professor Higuchi contends that people’s sovereignty is the constituent power, and it serves as the basis of legitimacy for government.²⁹ Historically, citizens resisted the monarchy through revolutions. The French Constitution of 1791 differentiated between revising the entire constitution and partially amending it.³⁰ Although the French Constitution of 1791 provided for complete revision as a theoretical possibility, it provided a method for only partially amending the Constitution.³¹ In general, the express inclusion of people’s sovereignty and constituent power into a constitution provides legitimacy for a government. Professor Higuchi fears that the Japanese government has abused its legitimacy in justifying majoritarian decisions by claiming it acts in the name of people’s sovereignty, which destroys the rule of law.³² Higuchi emphasizes the importance of human rights and opposes the arbitrary exercise of governmental power.³³ He argues that people’s sovereignty should comprise the basis of legitimacy.³⁴

In contrast, Professor Sugihara believes that people’s sovereignty means governmental power itself, noting that the people have actual power to govern themselves.³⁵ Although Professor Higuchi believes sovereignty is constituent power itself, Professor Sugihara places constituent power outside the scope of sovereignty. In Professor

29. HIGUCHI, KINDAI RIKKENSUGI, *supra* note 19, at 301-02; *see also* MATSUI, *supra* note 2, at 39.

30. HIGUCHI, KINDAI RIKKENSUGI, *supra* note 19, at 301.

31. *Id.*

32. *Id.* at 296-97; *see also* SUGIHARA, KOKUMIN-SHUKEN, *supra* note 20, at 324.

33. HIGUCHI, KINDAI RIKKENSUGI, *supra* note 19, at 296-97.

34. SUGIHARA, KOKUMIN-SHUKEN, *supra* note 20, at 324-25.

35. *Id.* at 325-36; MATSUI, *supra* note 2, at 39.

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Sugihara's opinion, sovereignty is a legal principle to explain attribution, to whom sovereignty belongs; people, as the collective will of a nation, should be central to final decision making.³⁶ Sugihara argues that power should be democratized because otherwise, human rights may be violated.³⁷ In Japan, a dramatic and rapid change among social classes has shifted focus from the nation to the people's constitution.³⁸

In examining the change from the previous constitution to the current Constitution, both Professor Higuchi and Professor Sugihara's arguments represent a conflicting understanding of sovereignty and how constituent power relates to it. Today, however, their arguments may not seem incongruous because they share similar concerns, such as how majoritarian decision making violates human dignity.³⁹ Professor Nobuyoshi Ashibe is concerned that constituent power is unlimited power and is left in the hands of the ruling administration.⁴⁰

C. A National Referendum's Binding Power

Although it may be impossible to assess whether the Constitution precisely reflects the will of the people, examining the voting rate may shed some light. Japanese constitutional scholars worry that most people are indifferent to national politics.⁴¹ Accordingly, a national referendum may seem like a better alternative because it calls for the people's direct participation on a political issue. The Japanese Constitution, however, does not contain a provision that allows a national referendum except for a few provisions in special situations:

36. YASUO SUGIHARA, *KENPŌ II* [CONSTITUTION II] 176 (Yuhikaku 1989) [hereinafter SUGIHARA, *KENPŌ II*]; see also TSUJIMURA, *supra* note 18, at 164-66.

37. SUGIHARA, *KOKUMIN-SHUKEN*, *supra* note 20, at 334-36.

38. SUGIHARA, *KENPŌ I*, *supra* note 24, at 147-63.

39. TSUJIMURA, *supra* note 18, at 168 (discussing Sugihara and Higuchi's views and how Ashibe's argument incorporates both).

40. ASHIBE, *supra* note 1, at 396-97 (arguing there should be limits on constitutional amendments).

41. MOTO, *KENPŌ*, *supra* note 1, at 147-48 (discussing the difficulty of defining the people's will and evaluating election results in a manner that allows it to be sufficiently reflected in the parliament).

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deciding on a constitutional amendment⁴² and “a special law, applicable only to one local public entity.”⁴³

In Japan, one of the famous academic discussions considers whether the current Constitution allows for a national referendum with binding power.⁴⁴ Generally, a national referendum with binding power is not allowed because it conflicts with sovereignty and the Japanese Constitution does not express any procedure for conducting it.⁴⁵ Under the current framework, representatives serve in the parliament, the Diet.⁴⁶ Article 41 of the Japanese Constitution provides that law-making powers belong solely to the Diet.⁴⁷ A national referendum with binding power would contradict Article 41. However, as mentioned above, the Constitution expressly provides some exceptions, such as a constitutional amendment.

Professor Hideki Moto is wary of utilizing a national referendum for a specific issue because it may be used as an excuse to justify enacting one of the ruling party’s policies.⁴⁸ Moto’s concern is that the outcome of a national referendum can be easily abused because of the people’s indifference to national politics. Similarly, Professor Kosuke Fukui argues that in a parliamentary system, political elites often use national referendums to advance their own will.⁴⁹

One of the current problems Japanese constitutional scholars are concerned with is that the people’s indifference to politics has led representatives to neglect the will of the voters. Currently, political parties do not function well enough to identify dynamic conflicts among the people. Even if not legally binding, a national referendum is more likely to be used to justify an unconstitutional motive of the cabinet.

42. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96 (Japan).

43. *Id.* art. 95.

44. NONAKA ET AL., KENPŌ II, *supra* note 5, at 10-14 (arguing that a recall system for representatives is not possible under the Japanese Constitution merely because of what representatives say during discussions in the parliament).

45. Some scholars believe a national referendum is possible. Toyoji Kakudo, *Chokusetu Minshusei [Direct Democracy]*, in NOBUYOSHI ASHIBE, HŌRITSU GAKUNO KISO CHISHIKI [BASIC OF LAW STUDIES] 9 (1969).

46. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. IV (Japan).

47. *Id.* art. 41; *see* MATSUI, *supra* note 2, at 66.

48. MOTO, KENPŌ, *supra* note 1, at 149.

49. KOSUKE FUKUI, KOKUMIN TOHYŌSEI [NATIONAL REFERENDUM] 225-26 (2007).

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Even if the Japanese people are not allowed to hold a national referendum with legal binding power, they should be given an opportunity to review negotiations or agreements between the representatives to determine whether the political parties involved deserve their trust. As the United Kingdom's (UK) "Brexit" has proven, constitutional scholars should be vigilant because there is a mismatch between the voice of the voters and the majority in the parliament.⁵⁰ Political indifference is a serious issue, which necessitates revitalizing public deliberation to encourage a more active discussion in the Diet.⁵¹

II. CONSTITUTIONALITY OF THE RECALL SYSTEM AT THE CENTRAL AND LOCAL LEVEL

The current Japanese Constitution applies indirect democracy; it implements direct democracy only on a few exceptional occasions. Since representatives work for all Japanese people, once elections are over, voters cannot recall their politicians.⁵² Unlike central politics in Tokyo, the Governor and representatives in local parliaments face a recall system under the Local Government Act.⁵³ The difference between the central and local governments helps explain the relationship between Japanese voters and their representatives.

A. Ability of Japanese Living Abroad to Engage in the Judge Recall System

Five types of courts make up the Japanese judicial system: (1) the Supreme Court, (2) High Courts, (3) District Courts, (4) Family Courts,

50. See generally Ian McEwan, *Brexit, The Most Pointless, Masochistic Ambition in Our Country's History, Is Done*, GUARDIAN (Feb. 1, 2020, 1:00AM), <https://www.theguardian.com/politics/2020/feb/01/brexit-pointless-masochistic-ambition-history-done> (discussing how the Brexit referendum played out).

51. MOTO, KENPŌ, *supra* note 1, at 149 (arguing that if a national referendum is to be carried out, sufficient information should be provided to the public).

52. See SUGIHARA, KENPŌ I, *supra* note 24, at 144 (noting one of the characteristics of a pure representative system is that if we understand the elected legislature as the sole decision maker and emphasize national sovereignty, then the other system of direct democracy—popular sovereignty—is excluded).

53. Chihō Jichi Hō [Local Autonomy Act], Law No. 67 of 1947, arts. 74-88 (Japan).

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and (5) Summary Courts.⁵⁴ The Supreme Court is the highest judicial body in the Japanese system; it is comprised of fifteen justices, one of which serves as the Chief Justice.⁵⁵ The only public officials that the people are allowed to reevaluate are these fifteen Supreme Court justices; the review process occurs during the first general election of the members of the House of Representatives following the justices' appointments and every ten years thereafter.⁵⁶ This exception allows the public to recall judges.

Representatives, like judges, are public servants,⁵⁷ and a similar review process should be afforded to Japanese people to reevaluate their representatives. As the Japanese Constitution states, Japanese people "have the inalienable right to choose their public officials and to dismiss them."⁵⁸ However, the Japanese Constitution does not provide specific procedural directions. Thus, the legislature's drafting of laws has sometimes failed to serve the public. For example, in May 2019, the Tokyo District Court held that the legislature infringed the constitutional rights of Japanese citizens living outside of Japan by denying their ability to participate in reviewing the performance of Supreme Court Justices.⁵⁹ Japanese citizens living abroad sued the

54. Saibansho Hō [Court Act], Law No. 59 of 1947, arts. 6, 15, 23, 31-2, 32 (Japan).

55. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 6(2) (Japan); *Supreme Court of Japan*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Supreme-Court-of-Japan> (last visited Mar. 2, 2020). In general, the people do not play any role in the selection of judges. Judges in inferior courts are "appointed by the Cabinet from a list of persons nominated by the Supreme Court." NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 80 (Japan). The Cabinet appoints all judges except the Chief Justice. *Id.* art. 79. The Emperor appoints the Chief Justice. *Id.* art. 6(2). Only the fifteen Justices that make up the Supreme Court are reviewed under a national examination. *Id.* art. 79(2).

56. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 79 (Japan).

57. *Id.* art. 15(2).

58. *Id.* Sugihara believes the Constitution demands direct democracy (a recall system) for all public officials based on Article 15(2). Moreover, Article 15, paragraph 1, requires that the people have a system for pursuing political responsibility. SUGIHARA, KENPŌ II, *supra* note 36, at 168. See MATSUI, *supra* note 2, at 41.

59. Tokyo Chihō Saibansho [Tokyo Dist. Ct.] May 28, 2019, Heisei 30 (gyo wa) no. 143, Heisei 30 (wa) no. 11936, Lex/DB no. 25570333.

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government⁶⁰ under the State Redress Act, which allows plaintiffs to recover damages caused by illegal government action.⁶¹ The plaintiffs argued that Japanese living abroad could not exercise their constitutional rights to review Supreme Court Justices.⁶² The plaintiffs were registered voters; however, they could not review justices “because they were living abroad and were not sent ballots.”⁶³ The Tokyo District Court held that Japanese people share equal voting power, but it may be restricted for unavoidable reasons.⁶⁴

Previously, in 2011, the Tokyo District Court expressed its suspicion about the constitutionality of not having a system in place for allowing voters abroad to exercise their constitutional rights in regard to reviewing the performance of justices.⁶⁵ In the Japanese justice review system, voters go to the House of Representative’s polling station and receive a sheet with the justices’ names.⁶⁶ If voters are not satisfied with the performance of a specific justice, they write “X” in a blank space above that justice’s name to signal that they wish to dismiss the justice.⁶⁷ The government argued that legislators have wide discretion to establish review systems and that in this specific case, the

60. Sakura Murakami, *Tokyo District Court Holds First Hearing on Expats’ Right to Vote on Supreme Court Justices*, JAPAN TIMES (June 11, 2018), <https://www.japantimes.co.jp/news/2018/06/11/national/tokyo-district-court-holds-first-hearing-expats-right-vote-supreme-court-justices/#.XizNdy2ZM0p>.

61. Kokka Baishō Hō [State Redress Act], Law No. 125 of 1947, art. 1(1) (Japan).

62. Tokyo Chihō Saibansho [Tokyo Dist. Ct.] May 28, 2019, Heisei 30 (gyo wa) no. 143, Heisei 30 (wa) no. 11936, Lex/DB no. 25570333 (“Failure to give citizens, age 18 or above, who live abroad, the opportunity to exercise the right of national examination is to guarantee the right as a unique right to some people and to violate equal opportunity to exercise the same right to others. . . . It also violates Article 22 (2) of the Constitution, which guarantees the freedom to travel abroad, because it restricts their right only for living abroad.”).

63. Murakami, *supra* note 60.

64. Tokyo Chihō Saibansho [Tokyo Dist. Ct.] May 28, 2019, Heisei 30 (gyo wa) no. 143, Heisei 30 (wa) no. 11936, Lex/DB no. 25570333 (“[I]t is reasonable to understand that the constitution guarantees equal opportunity to exercise the right of examination in the national examination, that is, to vote.”).

65. Tokyo Chihō Saibansho [Tokyo Dist. Ct.] April 26, 2011, 2136 HANREI JIHŌ [HANJI] 13 (Japan).

66. Saikō Saibansho Kokumin Sinsa Hō [Law of the People’s Examination of the Supreme Court Judges], Law No. 136 of 1947, arts. 12, 14, 15 (Japan).

67. *Id.* art. 15.

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legislators did not have enough time to go through the process of sending the ballots to Japanese citizens abroad.⁶⁸ However, the district court rejected the government's argument and found that the legislature's inaction "possibly violated the Constitution although [the court] did not grant compensation to the plaintiffs."⁶⁹ Ultimately, in 2019, the Tokyo District Court condemned the legislature for failing to provide opportunities for justice review to Japanese citizens residing abroad because of its unreasonable delay and declared the practice unconstitutional.⁷⁰

B. Legislative Action on Voting Rights for Japanese Abroad

Before analyzing the Tokyo District Court decision, it will help if we examine similar voting rights cases. The Constitution declares the principle that voters have equal rights,⁷¹ and the Public Office Election Act provides a detailed procedure for voting.⁷² In 1998, the Public Office Election Act was revised to enable elections outside of Japan.⁷³ Until 1998, voters living outside of Japan could exercise voting rights only in elections for "proportional representation in the House of

68. Tokyo Chihō Saibansho [Tokyo Dist. Ct.] April 26, 2011, 2136 HANREI JIHŌ [HANJI] 4 (Japan); *Editorial: Indictment of Diet Inaction Over Rights to Review Justices*, ASAHI SHIMBUN (June 4, 2019, 3:35 PM), <http://www.asahi.com/ajw/articles/AJ201906040042.html> [hereinafter *Editorial*].

69. *Editorial*, *supra* note 68; Tokyo Chihō Saibansho [Tokyo Dist. Ct.] April 26, 2011, 2136 HANREI JIHŌ [HANJI] 1, 5, 8, 15, 18 (Japan).

70. Tokyo Chihō Saibansho [Tokyo Dist. Ct.] May 28, 2019, Heisei 30 (gyo wa) no. 143, Heisei 30 (wa) no. 11936, Lex/DB no. 25570333.

71. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 14, 44 (Japan).

72. *See generally* Kōshoku Senkyo Hō [Public Office Election Act], Law No. 100 of 1950 (Japan) (laying out qualifications, procedures, and special provisions for voting). *See* MATSUI, *supra* note 2, at 42 ("[A]ll adult citizens are granted the right to vote by the Public Office Election Age," except "[t]hose who have committed crimes and are imprisoned" and "[t]hose who have committed election law violations.").

73. Shigenori Matsui, *The Voting Rights of Japanese Citizens Living Abroad*, 5(2) INT'L J. OF CONST. L. 332, 332 (2007). This revision was further affirmed by the Supreme Court in a 2005 decision clarifying that the resident status of a Japanese citizen cannot be used to limit their voting rights. Yuichiro Tsuji, *Disparidade do valor do voto e revisão judicial no Japão [Vote Value Disparity and Judicial Review in Japan]*, 5(2) J. OF CONST. RES. 57, 82 (2018) (Braz.) [hereinafter Tsuji, *Vote Value Disparity*]. *See* MATSUI, *supra* note 2, at 43-44.

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Representatives and the House of Councillors.”⁷⁴ Voters living outside of Japan could not exercise their voting rights in elections in single-seat constituencies for the House of Representatives and for the election district, which is conducted in all of the forty-seven prefectures for the House of Councillors.⁷⁵

In 2005, the Supreme Court held that such a system for voters outside of Japan was unconstitutional under the Public Office Election Act and under the State Redress Act.⁷⁶ The Supreme Court explained that voting rights may only be restricted for justifiable reasons.⁷⁷ One justifiable reason is that without restricting voting rights, it is impossible or remarkably difficult to maintain fair elections and to help voters exercise their right to vote.⁷⁸ Articles 43(2), 44, and 47 give the Diet discretion to structure electoral systems;⁷⁹ however, the legislature’s discretion to shape the process does not mean it can refuse to act, thus it would not easily qualify as a justifiable reason. The Japanese Supreme Court noted that restricting voters’ rights would be illegal under the State Redress Act only if the statute expressly infringes on citizens’ constitutional rights or if legislative action is expressly required to protect voters’ constitutional rights but the legislature fails to act.⁸⁰ After this case, the Public Office Election Act was revised.

74. Matsui, *supra* note 73, at 333. See MATSUI, *supra* note 2, at 43-44.

75. Tsuji, *Vote Value Disparity*, *supra* note 73, at 82-83. Today, the electoral system has changed. Tottori and Shimane prefectures are merged into one, and Tokushima and Kochi prefectures are merged into one because of the principle of equality in the Japanese Constitution. In a 2005 decision, all the representative seats were distributed among the forty-seven prefectures in accordance with the population. *Id.* at 71.

76. Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, Heisei 13 (Gyo Tsu) no. 82, 83, (Gyo Hi) no. 76, 77, 59(7) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHU] 2087 (Japan). See MATSUI, *supra* note 2, at 43-44.

77. Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, Heisei 13 (Gyo Tsu) no. 82, 83, (Gyo Hi) no. 76, 77, 59(7) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHU] 2087 (Japan).

78. *Id.* (“Such unavoidable grounds cannot be found unless it is deemed to be practically impossible or extremely difficult to allow the exercise of the right to vote while maintaining fairness in elections without such restrictions.”).

79. *Id.* (“Thus, the Constitution basically leaves it to the Diet’s discretion to decide the specific mechanism of the election system applicable to members of each House.”).

80. *Id.* (“In cases where it is obvious that the contents of legislation or legislative omission illegally violate citizens’ constitutional rights or where it is absolutely

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Currently, voters can visit the Japanese embassy or vote via mail.⁸¹ Both the 2005 and 2019 decisions demonstrated that people living outside of Japan could not exercise their constitutional right to review the performance of justices. Additionally, in 2019, the Tokyo District Court held the legislature was negligent for its inaction that prevented the plaintiffs from participating in reviewing the performance of justices during the 2017 election of the House of Representatives.⁸²

As the 2005 Supreme Court and the 2019 Tokyo District Court decisions explain, the legislature enjoys wide discretion in determining the structure of the national examination system.⁸³ Under Japanese constitutional studies, it is unconstitutional to adopt a recall system because representatives are independent of the voters in electoral districts; representatives serve as public officers for all of Japan.⁸⁴ As Part I explained, national sovereignty places too much emphasis on legitimacy (authority), which may promote people's current indifference to politics and may allow the legislature to easily break its commitments to the public once elected. Some Japanese scholars on

necessary to take legislative measures to assure the opportunity for citizens to exercise constitutional rights and such necessity is obvious, but the Diet has failed to take such measures for a long time without justifiable reasons, the legislative act or legislative omission by Diet members should exceptionally be deemed to be illegal for the purpose of Article 1(1) of the Law Concerning State Liability for Compensation.”).

81. Ministry of Internal Affairs and Commc'n, *Voting System*, <https://www.soumu.go.jp/senkyo/hoho.html> (Japan) (last visited Mar. 6, 2020); Ministry of Foreign Affairs of Japan, *Procedure for Voting Rights for Japanese Living Abroad*, <https://www.mofa.go.jp/mofaj/toko/senkyo/flow.html> (Japan) (last visited Mar. 6, 2020).

82. Tokyo Chihō Saibansho [Tokyo Dist. Ct.] May 28, 2019, Heisei 30 (gyo wa) no. 143, Heisei 30 (wa) no. 11936, Lex/DB no. 25570333.

83. See Tokyo Chihō Saibansho [Tokyo Dist. Ct.] May 28, 2019, Heisei 30 (gyo wa) no. 143, Heisei 30 (wa) no. 11936, Lex/DB no. 25570333; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], arts. 41, 43 (Japan); Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, Heisei 13 (Gyo Tsu) no. 82, 83, (Gyo Hi) no. 76, 77, 59(7) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHU] 2087 (Japan).

84. See MATSUI, *supra* note 2, at 41-42 (“Even though the Constitution also mentions the right to dismiss public officials, the Public Office Election Act does not allow voters to dismiss their representatives.”); see also *Id.* at 42 n.7 (“[S]ome argue that citizens should be allowed to dismiss their representatives if the latter violate mandates of the voters. However, most academics tend to believe that since the Diet members are representatives of all of the people, they should not be dismissed by voters from a single election district, even if the district is their own.”).

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the French Constitution have tried to understand the Japanese Constitution by studying the French Constitution of 1791's perspective on popular sovereignty. This perspective was meant to heighten voters' awareness that politics is integral to their ordinary lives. However, as far as Professor Moto is concerned, the ruling party may use the outcome of the recall system with non-binding power to justify the majoritarian decision.⁸⁵

C. How the Recall System Functions at the Local Level

It is unconstitutional to adopt a recall system for the legislature, unless the system is at the local governmental level. However, the Local Government Act has established a recall system in the current Constitution.⁸⁶ The Meiji Constitution does not contain any chapters or provisions regarding local government.⁸⁷ The president of the prefecture comes from the central government.⁸⁸ Chapter 8 of the current Constitution contains four provisions announcing the autonomy of local government.⁸⁹ The Constitution grants local government decision making power.⁹⁰ Local government functions as the school of democracy in Japan. The Local Government Act includes the details of how that autonomy is to operate.⁹¹ Most constitutional scholars have provided descriptive explanations about the purpose of local government democracy but have failed to explain the core of local government autonomy.⁹²

85. MOTO, KENPŌ, *supra* note 1, at 149.

86. Chihō Jichi Hō [Local Autonomy Act], Law No. 67 of 1947, arts. 74-88 (Japan).

87. *See* DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION] (Japan).

88. Fuken-sei [Prefectural System], Law No. 1 of 1888 (Japan) (Under the Meiji Constitution, the Ministry of Interior appoints the governors of prefectures.).

89. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. VIII (Japan).

90. *Id.*

91. *See generally* Chihō Jichi Hō [Local Autonomy Act], Law No. 67 of 1947 (Japan); HIROSHI OHTSU, BUNKEN KOKKA NO KENPŌ RIRON [CONSTITUTIONAL THEORY OF THE DECENTRALIZED STATE] 2-7 (Yushindo 1957) (Japan) (discussing local autonomy and the dispute about its meaning among scholars, while also noting that the Japanese Supreme Court has not clearly defined what it means in practice).

92. ASHIBE, *supra* note 1, at 86; OHTSU, *supra* note 91, at 2-13 (explaining that the core refers to the aspects of local government autonomy that may not be infringed upon).

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Similar to the European Union, in Japan, the principle of subsidiarity works in defining the relationship between the central and local government.⁹³ This principle advocates that social and political tasks should first be dealt with by the smallest capable authority, such as by individual members of the public, and a larger authority should step in only once the task exceeds the capabilities of the smaller authority.⁹⁴

In Japanese central politics, representatives are elected to the Diet and among their responsibilities is to pass, modify, or abolish statutes. Only the Diet possesses law-making power. The Prime Minister is nominated “from among the members of the Diet”⁹⁵ and appointed by the emperor.⁹⁶ The Prime Minister is the leader of the cabinet and has the power to appoint and remove ministers from the cabinet.⁹⁷ More than half of the ministers should be members of the Diet.⁹⁸ Thus, in Japan, the ruling party manages the cabinet under a parliamentary system. In Japan, the leader of the ruling party is the Prime Minister.⁹⁹ Members of the Diet can draft bills, but the cabinet may also submit

93. OHTSU, *supra* note 91, at 1-6; MOTO, KENPŌ, *supra* note 1, at 250; KOJI SATO, KENPŌ [CONSTITUTION] 546 (Seibundo 2011) (Japan); Eeva Pavy, *Fact Sheets on the European Union*, EUROPEAN PARLIAMENT 2 (Feb. 2020), https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf (“The general aim of the principle of subsidiarity is to guarantee a degree of independence for a lower authority in relation to a higher body or for a local authority in relation to central government. It therefore involves the sharing of powers between several levels of authority, a principle which forms the institutional basis for federal states. When applied in the context of the European Union, the principle of subsidiarity serves to regulate the exercise of the Union’s non-exclusive powers. It rules out Union intervention when an issue can be dealt with effectively by Member States at central, regional or local level and means that the Union is justified in exercising its powers when Member States are unable to achieve the objectives of a proposed action satisfactorily and added value can be provided if the action is carried out at Union level.”).

94. Pavy, *supra* note 93. *See generally* Yuichiro Tsuji, *Local Autonomy and Japanese Constitution - David and Goliath*, 8(2) S. KOR. LEGIS. RES. INST. J. OF L. AND LEGIS. 43 (2018) (discussing how local autonomy functions in Japan and arguing for financial independence from the central government).

95. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 67 (Japan).

96. *Id.* art. 6.

97. *Id.* arts. 66, 68.

98. *Id.* art. 68.

99. *See id.* ch. V.

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bills to the Diet.¹⁰⁰ Additionally, under Article 7 of the Constitution, the cabinet has unilateral power to dissolve the lower house (the House of Representatives).¹⁰¹

Unlike at the central government level, voters directly choose the president of the local government and the members of local parliament.¹⁰² However, one way the local government follows the presidential system is by allowing the governor of the local government to submit a proposed ordinance to the local parliament.¹⁰³ Still, the local parliament may reject the governor's bill.¹⁰⁴ Although the local governor may not dissolve the local parliament unilaterally, the governor may do so if a no-confidence resolution is passed.¹⁰⁵ The voters may recall a governor and members of the local parliament if they obtain the requisite number of signatures as set forth below:

Generally, one third is required to pass. However, if the total number of voters exceeds 400,000 but is less than 800,000, then one sixth of the number exceeding 400,000 is required. Moreover, if the total is more than 800,000, then one eighth of the excess votes are required. . . . If the total number [of voters] exceeds 400,000 and is 800,000 or less, the total number of required votes is obtained by the sum of one third of 400,000 and one sixth of the number exceeding 400,000. If the total number [of voters] exceeds 800,000, the total number of required votes is obtained by the sum of one third of 400,000, one sixth of the number exceeding 400,000 [up to 800,000], and one eighth of the number exceeding 800,000.¹⁰⁶

If the signatures are properly and legally submitted to the Election Administration Commission, then the election for the recall will be held within sixty days.¹⁰⁷ The voters may recall/dissolve the local

100. *Id.* art. 72.

101. *See id.* art. 7.

102. Chihō Jichi Hō [Local Autonomy Act], Law No. 67 of 1947, art. 17 (Japan).

103. *Id.* arts. 148, 149.

104. *See id.*

105. *Id.* art. 178.

106. *Id.* art. 81; *see also* Yanina Welp, THE POLITICS OF RECALL ELECTIONS 99-100 (2020) (explaining the signature requirements for a recall).

107. Chihō Jichi Hō [Local Autonomy Act], Law No. 67 of 1947, art. 76(3) (Japan); *see, e.g., Nagoya Sigikai rikōru shomei wa hōteisu wo 3213 uwamawaru*

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parliament and its members by fulfilling the same signature requirement.¹⁰⁸ Accordingly, this system represents direct democracy in practice because it involves a close relationship between the voters and elected officials of the local government.

This recall system is part of the political battle between the president and the local parliament in Japan. One example involves Mayor Takashi Kawamura of Nagoya city. In 2009, Kawamura ran for Mayor of Nagoya city and proposed a permanent fifty percent reduction of the local parliament members' salaries but also opposed the local parliament's continued existence.¹⁰⁹ Kawamura argued that the reason Japanese politics are not modernized is taxes support the local parliament members' salaries.¹¹⁰ As a mayor, Kawamura had no power to dissolve the parliament unilaterally, thus he collected signatures directly from voters to dissolve it.¹¹¹ The signatures were submitted to the election administration commission, which ruled that the signatures were void because most did not satisfy the signature requirements.¹¹² Consequently, the citizens urged the commission to reevaluate the signatures. Eventually, the commission determined that the signature

[*Nagoya City Council Recall, Signature Exceeds Legal Quota by 3213*], NIHON KEIZAI SHIMBUN (Dec. 15, 2010), https://www.nikkei.com/article/DGXNASFD15016_V11C10A2000000/ [hereinafter *Nagoya City Council Recall*].

108. Chihō Jichi Hō [Local Autonomy Act], Law No. 67 of 1947, arts. 76(3), 80(3), 81(2), 83 (Japan).

109. THE POLITICS OF RECALL ELECTIONS 105-06 (Yanina Welp & Laurence Whitehead eds., 2020); see *Nagoya sigikai kaisan he rikōru no shomei atsume hajimaru* [*Nagoya Municipal Assembly Disbanded, Recall Signature Collection Begins*], ASAHI (Aug. 27, 2010, 3:03 PM), <http://www.asahi.com/special/nagoya/NGY201008270003.html>; Chunichi Shimbun, 'Face of Election' Kawamura of Nagoya Now the Odd Man Out, JAPAN TIMES (Dec. 15, 2012), <https://www.japantimes.co.jp/news/2012/12/15/national/face-of-election-kawamura-of-nagoya-now-the-odd-man-out/#.XmQ3eC2ZM0o> [hereinafter 'Face of Election'].

110. See *Nagoya gin hōshu de saya-ate Sichō vs Jimin nado 3 kaiha* [*Nagoya, Rep. Saya = Mayor VS Liberal Democratic Party*], Archipelago Region Selection 2019, JIJI (Mar. 16, 2019), <https://www.jiji.com/jc/article?k=2019031600291&g=pol> (discussing Kawamura's efforts to lower municipal taxes and city council salaries, which political parties disagreed over).

111. See *id.*

112. *Nagoya City Council Recall*, *supra* note 107.

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requirement was met and the local parliament was dissolved.¹¹³ Subsequently, the city mayor resigned.¹¹⁴ Kawamura was reelected with the majority seats of his new party, Tax Reduction Japan (Genzei Nippon).¹¹⁵

III. DECLINING STATUS OF THE POLITICAL PARTY IN JAPANESE POLITICS

The Japanese Constitution is in the third phase of the German scholar Heinrich Triepel's theory regarding countries constitutional and legal approaches in regulating political party phenomenon: approval and legalization.¹¹⁶ Heinrich Triepel sets forth four phases of relations between parties and the state: the abatement of parties, the ignoring of parties, the legalization of parties, and the constitutional incorporation of parties.¹¹⁷ The Japanese Constitution does not have any provision tailored to a political party,¹¹⁸ but there are various legislative measures that govern parties. In Germany, the Weimar Constitution led to the loss of democracy through its flawed procedures and allowed the Nazis

113. *Nagoya Recall Petition Fails*, JAPAN TIMES (Nov. 25, 2010), <https://www.japantimes.co.jp/news/2010/11/25/national/nagoya-recall-petition-fails/#.Xm7EO5POIZ0>; see THE POLITICS OF RECALL ELECTIONS, *supra* note 109, at 105.

114. *Nagoya rikōru shomei 22000 nin bun no igi sinsei* [*Nagoya Recall Signature, 22000 Complaints Are Filed*], NIKKEI (Nov. 30, 2010), https://www.nikkei.com/article/DGXNASFD29033_Z21C10A1CN8000/; THE POLITICS OF RECALL ELECTIONS, *supra* note 109, at 105.

115. *Maverick as Hell*, ECONOMIST (Feb. 10, 2011), <https://www.economist.com/asia/2011/02/10/maverick-as-hell>; 'Face of Election', *supra* note 108; *Election of Nagoya Mayor 2017*, CHŪNICHİ (Apr. 24, 2017), <https://www.chunichi.co.jp/senkyo/nagoyashicho2017/>.

116. ASHIBE, *supra* note 1, at 290; NONAKA ET AL., KENPŌ II, *supra* note 5, at 55; MOTO, KENPŌ, *supra* note 1, at 156-57; see also Tsuji, *Vote Value Disparity*, *supra* note 73, at 77.

117. Małgorzata Lorencka, at al., *The Constitutionalization Process of Political Parties in Poland: Party System Evolution After 1918* 188-89, https://www.researchgate.net/publication/332269303_The_constitutionalization_process_of_political_parties_in_Poland_Party_system_evolution_after_1918 (last visited Mar. 29, 2020).

118. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan).

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to rule the government.¹¹⁹ The Japanese Constitution has a possibility of changing to the Fortified Democracy (Streitbare Demokratie).¹²⁰ Fortified Democracy is the idea that democracies “adopt[] certain measures to defend themselves against being overthrown by antidemocratic actors.” It was “[t]he fact that the Nazis could rely on lawful means in their quest for political power [that] made post-war Germany particularly conscious of the need to protect its re-established democracy against anti-democratic forces.”¹²¹

The Japanese Constitution expressly protects freedom of association and thereby the existence of political parties.¹²² However, the Constitution is silent about the private and public character of a political party.¹²³ The Constitution authorizes judicial reviews, but it does not grant any court exclusive jurisdiction over constitutional cases.¹²⁴ Additionally, the Constitution does not adopt a special procedure to review political parties’ actions that might violate the political process or try to overthrow the democratic order.¹²⁵ Except for a few cases, the Japanese Supreme Court reviews legal disputes. In

119. See *BRIA 21 3 b The German Weimar Republic: Why Did Democracy Fail?*, CONSTITUTIONAL RIGHTS FOUND., <https://www.crf-usa.org/bill-of-rights-in-action/bria-21-3-b-the-german-weimar-republic-why-did-democracy-fail> (last visited Mar. 7, 2020) (“The [Weimar] Constitution also gave [the president] the power to temporarily suspend constitutional rights and let the chancellor rule by decree in a “state of emergency.””).

120. *Rights and Wrongs Under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights – Chapter 8 Summary*, CAMBRIDGE UNIV. PRESS, <https://www.cambridge.org/core/books/rights-and-wrongs-under-the-echr/german-wehrhafte-demokratie/0226944636C4B209AAD6140130E1426F> (last visited Mar. 7, 2020) [hereinafter *Rights and Wrongs Chapter 8 Summary*] (explaining the term “streitbare Demokratie”); MOTO, KENPŌ, *supra* note 1, at 351.

121. *Rights and Wrongs Chapter 8 Summary*, *supra* note 120.

122. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21 (Japan); MOTO, KENPŌ, *supra* note 1, at 351.

123. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan).

124. Yuichiro Tsuji, *Constitutional Law Court in Japan*, 66 TSUKUBA J. OF L. AND POL. 65, 65 (2016); *Japanese Government: Supreme Court of Japan*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Supreme-Court-of-Japan> (last visited Mar. 7, 2020).

125. MOTO, KENPŌ, *supra* note 1, at 160. ASHIBE, *supra* note 1, at 291; See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan).

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Germany, democracy aims to protect human rights and is successful,¹²⁶ but in Japan, it may be abused to justify the majoritarian decision. This may be because of the two countries' different histories and constitutions.¹²⁷ In Japan, it is not clear what protections democracy is providing to political parties and what limitations, if any, it is imposing on them. Regarding Japanese politics, Professor Moto is concerned with a majority excluding the minority party from the political process in the name of democracy.¹²⁸ In Japan, the possibility of adopting a referendum presents the following question: Will the referendum prove that political parties' function and legitimacy as a medium between the voters and representatives has declined?

Since the Second World War, Japanese political parties have competed against each other in a complexly twisted pattern; sometimes they join together, and other times they separate.¹²⁹ The new Constitution was established in 1947, and the Japanese Liberal Democratic Party (LDP) was formed in 1955; the LDP "has held power almost continuously since its formation."¹³⁰ The Japanese people have witnessed severe factional disputes within the LDP, which has center-right and leftist factions. Japanese people have also seen a change of leadership inside the LDP, as it changed from the leading political party to the opposition. For example, from 2009 to 2013, there were significant changes as to the governing political parties. In 2009, the Democratic Party of Japan (DPJ) gained control of government.¹³¹ Subsequently, in March 2011, the Great East Japan Earthquake occurred, which was followed by the voters' disappointment with the

126. See Grundgesetz [GG] [Basic Law], § I *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.).

127. MOTO, KENPŌ, *supra* note 1, at 351 (Moto thinks that although there is no provision for Fortified Democracy in the Japanese Constitution, in actuality, such tactics may still be used in the political arena).

128. *Id.* at 158-59, 351.

129. *Id.* at 171.

130. Raymond Christensen, *Liberal-Democratic Party of Japan*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Liberal-Democratic-Party-of-Japan> (last visited Mar. 14, 2020).

131. *Id.*

government's response to this large-scale natural disaster.¹³² In 2012, the Abe cabinet was formed, and the lower house was dissolved.¹³³ Since then, opposing parties have been unstable and unable to compete with the ruling party or to reflect the voice of voters.¹³⁴ This chapter reviews the statutes that regulate, activate, and aim to protect political parties but that do not function well. Perhaps as a result, political parties are losing their ability to act as a medium between voters and the legislature.

*A. Historical Role of Political Parties in Japan
Before and After the Second World War*

After the Shogunate government in the Edo era (from 1603 and 1868), the new Meiji government followed the Prussian Constitution when drafting the Meiji Constitution by implementing a framework that would similarly allow strong government leadership.¹³⁵ Under the Meiji Constitution, sovereignty belonged to the emperor, and the government provided human rights to the people.¹³⁶ Thus, the government reserved the power to restrict human rights under the law. The Honoratiorenpartei¹³⁷ has existed since the Meiji Constitution.¹³⁸ Under the nondemocratic electoral system, celebrities and political leaders connected with each other and took over control of the political

132. See Kenneth Pletcher & John P. Rafferty, *Japan Earthquake and Tsunami of 2011*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Japan-earthquake-and-tsunami-of-2011> (last updated Mar. 4, 2020).

133. Christensen, *supra* note 130.

134. See Takuya Miyazato, et al., *Naze seiken wo taosenai noka [Why You Can't Defeat the Government]*, NHK POL. MAG. (Dec. 27, 2019), <https://www.nhk.or.jp/politics/articles/feature/26402.html> (discussing the factors that have contributed to the current Japanese administration being the longest in the history of Japan).

135. MAKOTO OHISHI, NIHONKOKU KENPŌ SI 60-61, 74, 139 (Yuhikaku 2005) (discussing why the government chose the Prussian Constitution as a model instead of others).

136. See DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 1, ch. II (Japan).

137. This term means a "political party comprised of local or national dignitaries." *Honoratiorenpartei*, DICT.CC, <https://www.dict.cc/german-english/Honoratiorenpartei.html> (last visited Mar. 7, 2020).

138. MOTO, KENPŌ, *supra* note 1, at 156 (discussing the transformation of political parties in Japan).

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party, and there was no inner discipline inside the political party to counteract that. In the 1910s, the democratic movement was incorporated into the political,¹³⁹ social, and cultural spheres; the movement became known as Taishō Democracy.¹⁴⁰ Taishō was the posthumous title of the emperor, and Taishō democracy was introduced by Professor Sakuzō Yoshino through his theory that democracy is the essence of constitutional politics.¹⁴¹ In 1925, universal suffrage was established¹⁴² along with a notorious law, the Maintenance of the Public Order Act (MPOA).¹⁴³ MPOA gave the power to arrest political offenders, such as socialists, to a specific police force.¹⁴⁴

Immediately after the Meiji Restoration, people from the four major prefectures (Satsuma, Chōshū, Tosa, and Hizen) monopolized major roles in government.¹⁴⁵ Taishō Democracy was created to resist political domination. During this Taishō Democratic era, politicians tried to establish a people's political party comprised of general citizens. Japanese constitutional studies focused on how to achieve a democratic political system under the Meiji Constitution. In the May 15 incident of 1932, (called the 511 incident), young naval military officers intruded into governmental offices and Prime Minister Tsuyoshi Inukai's house.¹⁴⁶ During the 511 incident, Prime Minister

139. See OHISHI, *supra* note 135, at 251-52.

140. SŌICHI SASAKI, RIKKEN HI-RIKKEN [CONSTITUTIONALISM AND NON-CONSTITUTIONALISM] 223 (Kōdansha bunko 2016) (Japan) (explaining how Taishō democracy originated).

141. *Id.*; OHISHI, *supra* note 135, at 242 (Ohishi believes the Taishō democracy movement was not strong enough to change the original governmental structure); ASHIBE, *supra* note 1, at 21.

142. Shūgin Senkyo Hō [The Election Law of the Member of the House of Representatives], Law No. 82 of 1925 (abolished) (Japan) (suffrage applied to males who had attained at least twenty-five years of age).

143. See Chian Iji Hō [Maintenance of Public Order Act], Law No. 46 of 1925 (Japan).

144. *Id.* arts. 2-4.

145. Shunsuke Sumikawa, The Meiji Restoration: Roots of Modern Japan (Mar. 29, 1999) (unpublished thesis, Lehigh University), <https://www.lehigh.edu/~rfw1/courses/1999/spring/ir163/Papers/pdf/shs3.pdf> (discussing the consolidation of power achieved by the four prefectures).

146. Jeff Kingston, *1936 Coup Failed, but Rebels Killed Japan's 'Keynes'*, JAPAN TIMES (Feb. 20, 2016),

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was killed.¹⁴⁷ Then, four years later, on February 26, 1936 (called the 226 incident), young army officers led around 1,400 officers to overthrow the government; however, even though the coup d'état failed, militarism developed in Japan.¹⁴⁸ In the 1940s, existing political parties were dissolved and incorporated into the Imperial Rule Assistance Association (IRAA or Taisei yokusankai) in the House of Imperial Diet in the Fumimaro Konoe cabinet.¹⁴⁹ IRAA organized and unified the will of the Imperial Diet, and it endorsed the Hideki Tōjō cabinet's military actions.¹⁵⁰

The history shows the evolving role of political parties in Japanese government, which was continuously referred to by previous constitutions despite sovereignty residing with the emperor. Today, the ruling party organizes the cabinet in the parliamentary system to maintain democratic legitimacy and stability under the current Constitution. Traditionally, political parties were expected to communicate the people's conflicting beliefs and wishes in the parliament. However, the IRAA oppressed political parties.¹⁵¹ Some may argue that the current Japanese Constitution is intentionally silent about the constitutional role and mission of political parties. They may argue the Constitution is silent because it expected a political party to arise from the new democratic ideals developing in Japan after the Second World War, whose capabilities it did not want to restrict.

Currently, the role of political parties is influenced by the two houses of the Diet. When the current Constitution was established, the House of Councillors functioned to check and review the lower house, the House of Representatives.¹⁵² As political parties developed and governed both Houses of the Diet, the role of the House of Councillors weakened.¹⁵³ As political parties succumbed, their members' function

<https://www.japantimes.co.jp/opinion/2016/02/20/commentary/1936-coup-failed-rebels-killed-japans-keynes/#.XmVTXZP010s>.

147. *Id.*

148. *Id.*

149. SATO, *supra* note 93, at 12; *see also* OHISHI, *supra* note 135, at 248.

150. MOTO, KENPŌ, *supra* note 1, at 43; SATO, *supra* note 93, at 12, 60, 62.

151. HIDEKI SHIBUTANI, KENPŌ [JAPANESE CONSTITUTIONAL LAW 2ND] 541 (Yuhikaku 2013); SATO, *supra* note 93, at 12.

152. ASHIBE, *supra* note 1, at 299-300; SATO, *supra* note 93, at 441-44; MOTO, KENPŌ, *supra* note 1, at 201, 217.

153. ASHIBE, *supra* note 1, at 289; MOTO, KENPŌ, *supra* note 1, at 217.

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as the medium between the voters and the Diet diminished. On the other hand, the number of unaffiliated voters increased.¹⁵⁴ Unaffiliated voters do not support any specific political party because they do not consider politics a central focus of their lives. Such voters do not believe that there are good political parties to elect because the existing Japanese political parties frequently change their positions and may do so simply to join with the one political party that holds the most power.

*B. Political Party's Strong Control
Under a Single-Seat Constituency System*

In 1994, an electoral system, called the single-seat constituency electoral system, was established.¹⁵⁵ Under this system, a political party may endorse only one official candidate in its electoral district.¹⁵⁶ As political parties received a large amount of financial support, the leading members, such as those in the LDP, gained power.¹⁵⁷ Simultaneously, the roles of the Secretary General, the Chairperson of the Policy Research Council, the Chairperson of the General Council, and the Head of the Election Strategy Headquarters were strengthened; in the LDP, these roles manage the party's internal functions, and most importantly, they endorse the members as political candidates and

154. Tanaka Aiji, *Japan's Independent Voters, Yesterday and Today*, NIPPON (Aug. 16, 2012), <https://www.nippon.com/en/in-depth/a01104/japan-s-independent-voters-yesterday-and-today.html>.

155. Kōshoku Senkyo Hō [Public Office Election Act], Law No. 100 of 1950, art. 86 (Japan); *The Government of Modern Japan: Elections*, ASIA FOR EDUCATORS, http://afe.easia.columbia.edu/special/japan_1900_elections.htm (last visited Mar. 8, 2020) (“Perhaps the most important result of the LDP’s temporary loss of power was the coalition government’s reform of the election system, enacted in 1994. The reformers’ primary goal was to create a system in which there are two main parties that regularly alternate power, as is the case in the United States. Up until that time, the Japanese system consisted of one lopsidedly large party (the LDP) dominating three or four smaller opposition parties that were never able to win control of the government.”); see also MOTO, KENPŌ, *supra* note 1, at 163.

156. Kōshoku Senkyo Hō [Public Office Election Act], Law No. 100 of 1950, art. 86-2 (Japan) (If a political candidate is endorsed by political party, he or she can put his or her name on a list of candidates for the proportional representative election).

157. See Masayuki Yuda, *How Does Japan Fund Election Campaigns?*, NIKKEI ASIAN REVIEW (Oct. 11, 2017), <https://asia.nikkei.com/Business/Finance/How-does-Japan-fund-election-campaigns>.

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distribute money to the members for the next election.¹⁵⁸ Leading party members can officially endorse who they want as the candidate for their political party in the single-seat constituency electoral district.¹⁵⁹ The influential power of these political endorsements has the effect of pressuring these candidates to follow that political party's policy. As a result, candidates tend to mainly consider the political parties' will, and not that of the voters. This reinforces the above-mentioned constitutional theory that once elected, representatives are independent from the voters' will.

The Political Funds Control Act (PFCA) aims to limit the allowable contributions to a candidate.¹⁶⁰ For example, the candidate may receive funds through a political party or political association.¹⁶¹ However, the political party may only receive up to 20 million yen a year in individual contributions and up to 100 million yen a year in corporate contributions from each corporation.¹⁶² PFCA reflects the belief that political bribery in the late 1980s caused funds to flow primarily through political parties.¹⁶³

Additionally, under the Political Party Subsidies Act (PPSA), political parties may receive government subsidies¹⁶⁴ for their

158. *See generally* LDP Constitution: Chapter II Executive Bodies, LIB DEMS, <https://www.jimin.jp/english/about-ldp/constitution/104146.html> (last visited Mar. 15, 2020) (discussing the different roles in the LDP and their interrelation).

159. ASHIBE, *supra* note 1, at 304-05.

160. *See generally* Seiji Shikin Kisei Hō [Political Funds Control Act], Law No. 194 of 1948 (Japan) (laying out requirements and restrictions of political funding).

161. *Id.* art. 3 (defining political party and political organization, as well as laying out their purpose).

162. *Id.* art. 21-3 The ceiling for a corporation's contribution depends on the size of the corporation. *Id.*

163. MOTO, KENPŌ, *supra* note 1, at 165; SATO, *supra* note 93, at 422; Daisuke Akimoto, *Power and Money in Japanese Politics*, JAPAN TIMES (Feb. 16, 2020), <https://www.japantimes.co.jp/opinion/2020/02/16/commentary/japan-commentary/power-money-japanese-politics/#.XmV9gC2ZN0s> (discussing the bribery scandals that have shaken Japanese politics and how the PFCA regulates political party funding).

164. Seitō Josei Hō [Party Subsidies Act], Law No. 5 of 1994, art. 1 (Japan) ("In view of the importance of the political parties' function in parliamentary democracy, this law provides that the state should subsidize political parties with political grants, and the necessary political party requirements and notifications. . . . By stipulating procedures for the award of grants and by reporting their uses and taking other necessary measures, we will promote the sound development of political activities of

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candidates, which come from the people's taxes.¹⁶⁵ Every year, Japanese people pay 250 yen for this public fund, which amounts to a total of approximately 32 billion yen a year.¹⁶⁶ Only eligible political parties may receive public funding without spending restrictions.¹⁶⁷ PPSA public funds compose around seventy to eighty percent of the income of the ruling and opposing party.¹⁶⁸ Half of the public funds for political parties are distributed according to the number of representatives each party has in the Diet and based on the number of votes the party earned in past elections.¹⁶⁹ Therefore, the majority party, having earned the majority of votes in past elections, may receive more funding than other parties.¹⁷⁰ Currently, the statutes governing political party funding work to maintain the status quo, which benefits the majority.¹⁷¹ Like the public funding support system, the single-seat constituency system reinforces the ruling party's power. Therefore, smaller opposition parties have a slim chance of winning control of the government.

political parties and ensure their fairness and thereby promote the sound development of democratic politics.”).

165. *Id.* art. 4(2) (“Political parties should pay special attention to the fact that the subsidy will be financed by taxes and other precious resources collected from the people, and should be aware of their responsibilities and should not rely on the public.”).

166. *Id.* art. 7. The total is based on the population of Japan, which as of 2017 is 126.8 million (126.8 million times 250 yen equals 31.7 billion yen). *Population, Total – Japan, WORLD BANK*, <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=JP> (last visited Mar. 8, 2020).

167. *Id.* art. 2 (defining political party as it relates to this law).

168. MOTO, KENPŌ, *supra* note 1, at 167.

169. LIBRARY OF CONG., REGULATION OF FOREIGN INVOLVEMENT IN ELECTIONS: JAPAN 58 (2019), <https://www.loc.gov/law/help/elections/foreign-involvement/foreign-involvement-in-elections.pdf>.

170. MOTO, KENPŌ, *supra* note 1, at 165-66.

171. MOTO, KENPŌ, *supra* note 1, at 162.

C. Political Parties and the Judiciary

The current Constitution does not regulate the conduct of political parties,¹⁷² and the judiciary refuses to override the autonomy of political parties;¹⁷³ therefore, political parties may make decisions that infringe upon their members' rights. The Hakamada case illustrates how the judiciary has refused to intervene in the internal disputes of political parties.¹⁷⁴ In Hakamada, the Japanese communist party expelled one of its members, Satomi Hakamada, and filed a lawsuit to evict him from his house, alleging that the property belonged to the party.¹⁷⁵ First, the Supreme Court noted that political party's disputes that do not directly relate to the general civic order would fall outside of its jurisdiction.¹⁷⁶ Then, the Court reviewed the procedures for expelling and evicting party members and found that the party's decision to expel and evict Hakamada was not illegal.¹⁷⁷ This case illustrates that the judiciary intervenes in the internal conflicts of a political party only when the issue implicates the Constitution's freedom of association provision.

Under the Constitution, a political party must serve as a medium between the voters and their representatives.¹⁷⁸ Thus, political parties should bring various perspectives into the parliament. However, this can be challenging because party leaders exercise control over their members. Ultimately, the majority party controls the parliament and weakens the House of Councillors' role by restricting free spirited discussion among members. As noted above, although the judiciary

172. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21 (Japan). The Constitution only expresses the freedom of assembly and association. *Id.*

173. See Jessica Conser, *Achievement of Judicial Effectiveness through Limits on Judicial Independence: A Comparative Approach*, 31 N.C. J. INT'L L. & COM. REG. 256, 311 ("In addition to refusing to answer political questions, Japanese courts generally refuse to answer quasi-political questions."); see also MOTO, KENPŌ, *supra* note 1, at 164; ASHIBE, *supra* note 1, at 346; SATO, *supra* note 93, at 420.

174. See generally Saikō Saibansho [Sup. Ct.], Dec. 20, 1988, Showa 60 (o) no. 4, 155, SAIKŌ SAIBANSHO SAIBANSHU MINJIHEN [SHUMIN] 405 (Japan) (discussing the need for organizational independence and freedom).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

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may intervene in political party decision making, it prefers to defer to the party's decision, unless the dispute raises a constitutional issue.

IV. GENERAL LEGAL PRINCIPLES TO STOP A REFERENDUM

The Japanese judiciary may use constitutional justifications to prohibit binding and non-binding national referendums. To understand the extent to which holding a national referendum is possible, it is helpful to review several judicial decisions regarding local governments. Even after a national referendum or resolution of the parliament reaches a certain outcome, the judiciary may use several legal principles, like estoppel,¹⁷⁹ to prevent the government from abusing the outcome such as by implementing policies that betray people's expectations.

A. Local Ordinance Annulled by the Judiciary

In a classic case of estoppel, a construction company planned to construct an intermediate treatment facility of waste disposal in Kii Nagashima city of Mie prefecture.¹⁸⁰ In November 1993, the company submitted a building plan to the Mie prefecture.¹⁸¹ The company's application to build and operate was granted in May 1995.¹⁸² Before such events, Mie prefecture and Kii Nagashima city held meetings and consultations in regard to passing a city water quality ordinance, allegedly to protect water reserves.¹⁸³ In March 1994, the

179. Estoppel is “[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before, or what has been legally established as true.” *Estoppel*, CORNELL LAW, <https://www.law.cornell.edu/wex/estoppel> (last visited Mar. 8, 2020).

180. Saikō Saibansho [Sup. Ct.] Dec. 24, 2004, Heisei 12 (gyo tsu) no. 209, 58(9) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHU] 2356 (Japan) (The Supreme Court concluded that the city should have advised appropriately to maintain water quality and prevent water shortage. Thus, the Supreme Court remanded to the high court to review if administrative disposition was illegal in violation of consideration of the party. On remand, the Nagoya High court held that the city was in violation of consideration and illegally designated the business company as a business operator under the local ordinance.).

181. *Id.*

182. *Id.*

183. *Id.*

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Kii Nagashima city parliament passed a city ordinance to regulate businesses that may cause water pollution or water shortages by prohibiting them from constructing certain facilities.¹⁸⁴ Later, the city council found that the company had taken ninety-five cubic meters of water, thus causing water shortages.¹⁸⁵ Accordingly, the city ordinance prohibited the company from building the intermediate treatment facility, despite the fact that the company's application to build and operate was previously granted.¹⁸⁶ In fact, the city ordinance was specifically passed to stop the company from constructing the intermediate treatment facility of waste disposal in the city.¹⁸⁷

However, the Supreme Court held that Kii Nagashima city should have given the company an opportunity to be heard and should have advised it to construct according to the guidelines of the ordinance.¹⁸⁸ The city government must provide a business that has already prepared for or began its business activities that may be regulated under a new city ordinance with the opportunity to accept such ordinance and to agree to abide by and fulfill the conditions thereof, *before* suspending

184. *Id.*

185. *Id.* (“On May 9, 1995, the jokoku appellant responded that 95 kiloliter of underground water would be consumed per day, and then on May 16, the Council informed the jokoku appellee of its view that the Facility should be recognized as a place of business subject to regulation [under the ordinance].”).

186. *Id.*

187. *Id.* (“Under such circumstances, the jokoku appellee can be deemed to have known the fact that the jokoku appellant had already initiated the procedure relating to the application for permission of the establishment of industrial waste treatment facility before the establishment of the Ordinance, and have had the opportunity to consider, through the procedure, what measures should be taken by the town government to balance the necessity to establish the Facility and the necessity to protect the water source.”).

188. *Id.* (“Assuming that, before making the Decision, the jokoku appellee had the duty to sufficiently consult with the jokoku appellant through the procedure provided under the ordinance, while taking into account the jokoku appellant's position [of having relied on the prior approval to start building] mentioned above, provide appropriate instructions to the jokoku appellant to correct the expected amount of water intake for the purpose of protecting water source, by encouraging the jokoku appellant to limit the amount of underground water to be used for the facility, and give due consideration not to unreasonably harm the position of the jokoku appellant. The decision would inevitably be deemed to be illegal if it had been made in violation of this duty.”).

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its activity.¹⁸⁹ This case illustrates how the local government may pass particular local ordinances to specifically target certain businesses or individuals. However, this case also demonstrates that the judiciary may ultimately prohibit the local government from passing certain ordinances that intentionally target a specific business or individual.

B. Local Parliament's Resolution Violates Relationship of Trust

In another case, a company planned to construct a paper production plant in Ginoza village in Okinawa prefecture.¹⁹⁰ The company requested permission from the local government to receive a parcel of land and to build the production plant.¹⁹¹ In 1971, the president of the village made an official statement, approved by the local parliament, that the village would fully cooperate in building the paper production plant.¹⁹² The local parliament decided to offer the requested land, placing the construction of the production plant in motion.¹⁹³ Subsequently, in 1973, the village elected a new president who objected to building the plant.¹⁹⁴ The new president refused to pay for the plant's construction.¹⁹⁵ Accordingly, the company sued the village for compensatory damages.¹⁹⁶

The Supreme Court held that the village unreasonably and illegally destroyed the relationship of trust it had created with the company.¹⁹⁷ Once the village took an official position with the parliament's resolution, endorsing the plant's construction, the company relied on this position and began building.¹⁹⁸ Construction had progressed, but

189. *Id.*

190. Saikō Saibansho [Sup. Ct.], Jan. 27, 1981, Showa 51 (o) no. 1338, 38(1) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHU] 35 (Japan); *see also* GYOSEIHO HANREI HYAKUSEN 52-53 (7th ed., vol. I 2017) (Japan) (summarizing the paper production plant case).

191. Saikō Saibansho [Sup. Ct.], Jan. 27, 1981, Showa 51 (o) no. 1338, 38(1) SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHU] 35 (Japan).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

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all of a sudden, the new president refused to cooperate and compensate; this caused the company to suffer monetary loss. The Supreme Court explained that electing a new president of local government may result in policy changes; thus, to avoid unreasonable destruction of trust, a private party should be given reasonable notice of the upcoming policy changes.¹⁹⁹

C. Local Referendum Regarding U.S. Military Bases in Okinawa

Okinawa constitutes less than one percent of the total land of Japan where around seventy percent of all U.S. military bases in Japan are located.²⁰⁰ Since Okinawa became a Japanese territory in 1972, it has had frequent conflicts with the central government regarding the presence of U.S. military bases. Analyzing this issue will illustrate how the current Constitution addresses local governments' autonomy. Article 95 of the Japanese Constitution provides appropriate procedures for enacting special local laws.²⁰¹ However, local governments have used local referendums to promote specific local policies, instead of following procedures provided by Article 95.²⁰²

The local referendum process can be completed in two ways: (1) through the Political Office Election Act²⁰³ and Local Government Act,²⁰⁴ by requesting signatures from one-fiftieth of the total voters with the consent of the local parliament; and (2) through the local parliament by passing a local ordinance using only the local referendum

199. *Id.*

200. Justin McCurry, *Okinawa Referendum: Everything You Need to Know*, GUARDIAN (Feb. 21, 2019, 7:35 PM), <https://www.theguardian.com/world/2019/feb/22/okinawa-referendum-everything-you-need-to-know>.

201. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 95 (Japan) (“A special law, applicable only to one local public entity, cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with the law.”).

202. SHIBUTANI, *supra* note 151, at 745.

203. Kōshoku Senkyo Hō [Public Office Election Act], Law No. 100 of 1950 (Japan).

204. Chihō Jichi Hō [Local Autonomy Act], Law No. 67 of 1947, art. 74 (Japan).

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procedure.²⁰⁵ A local ordinance may set forth the requirements for voter eligibility, such as age, and residency or citizenship, and may determine whether the referendum will be legally binding.²⁰⁶

The government of the Okinawa prefecture has used the local referendum mechanism to determine whether it should rearrange and reduce U.S. military bases in Okinawa and whether it should review the Japan-U.S. Status of Forces Agreement. In December 2018, the central government proposed that a U.S. military base be relocated to Henoko bay area in Okinawa.²⁰⁷ In October 2018, Denny (Yasuhiro) Tamaki became the governor of the prefecture.²⁰⁸ In February 2019, Okinawa held a referendum regarding the relocation of the Futenma U.S. air base to Henoko.²⁰⁹ Some local cities strongly opposed holding this referendum; however, the referendum concluded with over seventy percent of voters voting against the relocation.²¹⁰ As a result, Tamaki resisted the central government's plan to relocate the U.S. base to Henoko bay area and opposed the current Japan-U.S. defense and security policies.²¹¹ Tamaki argued that the U.S. base is a heavy burden that rests solely on the people of Okinawa.²¹² The result of this local referendum impacted the central government's decision making.

205. MOTO, KENPŌ, *supra* note 1, at 256; SHIBUTANI, *supra* note 151, at 747-48.

206. SHIBUTANI, *supra* note 151, at 748 (arguing that a local referendum with binding power is unconstitutional).

207. Justin McCurry, *Okinawa Rejects New US Military Base but Abe Vows to Push on*, GUARDIAN (Feb. 25, 2019, 9:05 PM), <https://www.theguardian.com/world/2019/feb/24/okinawa-referendum-rejects-new-us-military-base-but-abe-likely-to-push-on>. The central government led by Prime Minister Abe pushed for this relocation even though the voters of Henoko rejected the move in a referendum. *Id.*

208. Mari Yamaguchi, *AP Explains: The New Okinawa Governor and US Military Bases*, AP NEWS (Oct. 1, 2018), <https://apnews.com/d991048b5029481094be35ec600a322a/AP-Explains:-The-new-Okinawa-governor-and-US-military-bases>.

209. McCurry, *supra* note 207.

210. *Id.*

211. Yamaguchi, *supra* note 208.

212. Gerry Partido, *Tamaki Tells Governor US Bases a '[B]urden' to Okinawa*, PNC (Aug. 30, 2019), <https://pncguam.com/tamaki-tells-governor-us-bases-a-burden-to-okinawa/>.

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D. Types of Local Referendum: Permanent or Temporary

There are three types of local referendum. First, as mentioned above, the Japanese Constitution has a special provision regarding referendum that is applicable to local governments. It requires the consent of the majority of the voters of the local public entity involved. The second type is provided by the statutory referendum in the Local Government Act, which allows voters to dissolve the local parliament,²¹³ recall members of the local parliament,²¹⁴ or recall the governor.²¹⁵ The third type involves a local referendum via a local ordinance.²¹⁶

There are two types of local referendums via local ordinance: (1) temporary referendum and (2) permanent referendum. Temporary referendum is provided by the Local Government Act.²¹⁷ For the temporary referendum, the local parliament initiates a local referendum via a local ordinance after receiving a specific proposal from the governor or members of the local parliament, or a local resident's request.²¹⁸ Temporary referendums have the advantage of a flexible design as to the referendum's theme. Moreover, the referendum's goals are clear, allowing voters to deliberate and preventing potential abuse of the referendum. Even after a local parliament passes an ordinance, it takes time to determine the theme and requirements, such as voter eligibility. One negative aspect of a local ordinance is that it may be too flexible, allowing for manipulation and abuse of the outcome.

For permanent referendum, the local parliament's resolution establishes the referendum's eligibility requirements and procedures

213. Chihō Jichi Hō [Local Autonomy Act], Law No. 67 of 1947, arts. 76(3), 77 (Japan).

214. *Id.* arts. 79, 80(3).

215. *Id.* arts. 81(2), 82.

216. *Id.* arts. 12, 74.

217. *See id.*

218. MOTO, KENPŌ, *supra* note 1, at 256-57 (arguing that the local governments should be given sufficient time to establish the framework for a local referendum); SATO, *supra* note 93, at 561-62 (arguing that giving a local referendum binding power would be unconstitutional because it would emphasize direct democracy, while the Constitution emphasizes representative democracy).

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through ordinance in advance.²¹⁹ With the procedure determined in advance, it takes less time to open a referendum than it would without the local parliament's resolution. When the ordinance is accepted, the referendum will be opened without the local parliament's resolution. The negative aspect of this type of permanent referendum is that without a resolution, the referendum's requirements might be too abstract. This might cause controversies, abuse of the referendum process, and waste of time and resources. The referendum administrator has the ultimate discretion to decide whether to hold the referendum or not.²²⁰ The referendum administrator's decision regarding holding the referendum may not be supported by voters, which may cause potential litigation. Local parliament's discretionary power to decide whether to hold the referendum is the key difference between the permanent and temporary referendums.

*E. Local Versus National Agreements
Regarding Nuclear Power Plant Reactivation*

In Japan, nuclear power plants generate substantial financial profit for local inhabitants. At the same time, however, such plants pose risks to the lives and health of people living near the reactor. Currently, no statute requires the consent of the local government to reactivate a nuclear power plant. After the LDP took over the government in 2012, the Abe cabinet announced that nuclear energy is a key power supply.²²¹ Recognizing the importance of nuclear energy production, new safety regulations, such as the Nuclear Regulation Authority

219. MOTO, KENPŌ, *supra* note 1, at 256-57; *see also* Tadashi Ogawa, *Jōsetsugata jumin tōhyō jōrei ni okeru jumin tōhyō no taishō jikō gaitōsei hiroshima kohan heisei 24nen 5gatu 16hi* [Requirement of local ordinance Hiroshima High Ct. Heisei 24, May 16], 429 JICHI-SOKEN 1, 1-3 (2014).

220. Ministry of Internal Affairs and Communications, *Chihō jichi tai ni okeru jūmin tōhyō ni tsuite* [Local Referendum in Local Government], https://www.soumu.go.jp/main_content/000087296.pdf (Japan) (last visited Mar. 9, 2020).

221. Tom Corben, *Nuclear Power in the New Abe Cabinet*, DIPLOMAT (Sept. 20, 2019), <https://thediplomat.com/2019/09/nuclear-power-in-the-new-abe-cabinet/>.

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(NRA), were passed, and those nuclear power plants that met the new standards were reactivated.²²²

Some nuclear power plant operators reached an agreement with the local government regarding new safety measures for nuclear power production, such as environmental monitoring, accountability for harm caused, investigation by the local government, risk communication, compensation, and obtaining consent before making additions or changes in the building of the nuclear power plant. This agreement is not binding, but it forms a foundation for the local government's involvement in decision making and helps maintain trust between the operator and the local people. In April 2018, Japan Atomic Power Company (APC) reached an agreement with six cities and municipalities for reactivating the second Tokai nuclear power reactor.²²³ Local government was allowed to engage with the reactivation process.²²⁴ APC has prepared a plan for the second Tokai nuclear power reactor's reactivation.²²⁵ An evacuation plan will be prepared for approximately one million people who live within a radius of thirty kilometers from the reactor as an Urgent Protective action Planning Zone (UPPZ).²²⁶ The previous standard required evacuation only for up to eight to ten kilometers from the nuclear power reactor as an Emergency Planning Zone.²²⁷ Expanding the geographic area of an UPPZ means more inhabitants and local governments are affected by the reactivation process.

Nuclear power plant operators make reactivation agreements, with the local government where the reactor is located and with other local

222. *Reviewing the Nuclear Regulation Authority*, JAPAN ATOMIC INDUS. FORUM, INC. (Feb. 6, 2015), <https://www.jaif.or.jp/en/reviewing-the-nuclear-regulation-authority/>; see *NRA's Core Values and Principles*, NUCLEAR REGULATION AGENCY, http://www.nsr.go.jp/english/e_nra/idea.html (Japan) (last visited Mar. 9, 2020).

223. *Local Consent for Nuclear Plant Restarts*, JAPAN TIMES (Apr. 5, 2018), <https://www.japantimes.co.jp/opinion/2018/04/05/editorials/local-consent-nuclear-plant-restarts/#.XjPZpS2ZPOQ>.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Nuclear Emergency Preparedness: Frequently Asked Questions*, CABINET OFFICE, https://www8.cao.go.jp/genshiryoku_bousai/faq/faq.html (Japan) (last visited Mar. 9, 2020).

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governments nearby, regarding various safety measures.²²⁸ “The agreements stipulate the lines of communication when the plants have problems, as well as procedures for prior consent to restarting and modifying reactors or building new ones, though they are not legally binding.”²²⁹ Therefore, the operators still face prospective litigation asking for an injunction on operation²³⁰ because these agreements with nearby local governments are not legally enforceable. Operators face an important challenge: how to maintain the trust of local inhabitants.

Although a local government has no power to investigate, the Nuclear Regulatory Authority does.²³¹ “The NRA is an external bureau of the Ministry of the Environment. The chairman and commissioners of the NRA are appointed by the prime minister, with the consent of the Diet.”²³² The NRA can permit the construction or reactivation of a nuclear power reactor.²³³ In July 2019, eight years after the Great East Japan Earthquake occurred, the Tokyo Electric Power Company Holdings (TEPCO) *finally* decided to abolish the second Fukushima nuclear power plant.²³⁴ TEPCO owes 16 trillion yen in damages to compensate victims and 500 billion yen a year to pay for the cost of shutting down.²³⁵ This case shows the urgent need to grant local governments the authority to hold local referendums to investigate and regulate matters that affect the local population, such as nuclear power plant reactivation.

228. See, e.g., *Local Consent for Nuclear Plant Restarts*, *supra* note 223.

229. *Id.*

230. *Genpatsu kadō ibaraki hō shiki ashi-gakari ni* [(Editorial) *Nuclear Power Plant Operation Agreement “Ibaraki method” as a Foothold*], ASAHI (Apr. 3, 2018), <https://www.asahi.com/articles/DA3S13433526.html> (Japan).

231. See generally OECD NUCLEAR ENERGY AGENCY, NUCLEAR LEGISLATION IN OECD AND NEA COUNTRIES (2017), <https://www.oecd-nea.org/law/legislation/japan.pdf> (discussing nuclear legislation and regulation in Japan).

232. *Id.* at 16.

233. *Id.* at 8.

234. *TEPCO Says Will Decommission Fukushima Daini Nuclear Reactor*, KYODO NEWS (July 24, 2019, 9:31 PM), <https://english.kyodonews.net/news/2019/07/e344e64406e2-tepco-says-will-decommission-fukushima-daini-nuclear-reactor.html>.

235. TOKYO ELECTRIC POWER COMPANY, TEPCO INTEGRATED REPORT 2017 13-14, 53 (2017), https://www7.tepco.co.jp/wp-content/uploads/hd05-02-03-002-tir2017_01-e.pdf.

CONCLUSION

With the increasing globalization of politics, culture, and the law, the scope of sovereignty has narrowed. Over time, people became increasingly indifferent to politics. Thus, direct democracy may be a good method for connecting voters with politics. Popular sovereignty is the principle that authority and power reside with the people. Legitimacy is given to representatives who are expected to work for all of the people once elected. Representatives are expected to reflect the peoples' diverse perspectives in the parliament and integrate them into the law. Japanese constitutional studies examine how to assure that the people's diverse voice reaches the parliament and how to allocate the parliamentary seats to adequately reflect the people's vote. When the Japanese Constitution was established, it cemented constituent power as the power to amend, meaning it can be activated only when the people amend the constitution directly. However, the Constitution provided a few exceptions such as power to amend the constitution and power to enact special laws applicable to the local governments. Mostly, however, only representatives actively participate in politics.

Only the Diet possesses law making power. It is unconstitutional to hold legally binding national referendums, but a national referendum with no legal binding power may be available at the level of central government. Although people may not consider politics as an important part of their daily lives, they should remain vigilant of majoritarian abuse over the referendum's outcome even if it is not binding. If the referendum results in a mistake, a series of constitutional defense valves shall be activated to prevent one mistake from leading to another. As a series of legislative actions are taken but fail, the judiciary must use a general legal principle in addition to constitutional principles. If the legislature is paralyzed, the judiciary may intervene in the political process by holding that legislative inaction is unconstitutional. If the political process fails, the judiciary is constitutionally required to check the legislature. One of the reasons for legislative paralysis is due to the role of political parties. Under the current Constitution, the political parties are expected to be the medium between voters and the legislature. By following the political party's decisions, members can perform their jobs as representatives.

The history of Japanese politics proves that politicians and scholars have tried to establish democracy under the previous constitution where

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the emperor was the sovereign. The current Constitution has no provision specially tailored to regulate political parties' conduct. The Japanese Constitution may expect political parties to actively connect voters with the political process, but if we consider the strong financial power backing a political leader, that view may prove too optimistic. In order to prevent financial flow directly to a political candidate, statutes prescribe how money should pass through the political party. To stop political bribery, statutes financially support parties with the people's general taxes. Still, in a single-seat constituency system, the political party leader has the power to officially endorse the candidate in the electoral district. As a result, the representatives usually follow the majority political party's decision and tend to ignore the voters' wishes. However, as the above-mentioned cases illustrate, the judiciary may, under the Constitution, stop the local parliament from unilaterally altering decisions. Therefore, the judiciary shall use the Constitution to prevent the parliament from acting unilaterally without considering the people's needs, wishes, or demands.